TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. ~~315~~ 83.

EDWARD W. VOIGT, PLAINTIFF IN ERROR,

vs.

THE CITY OF DETROIT AND THOMAS M. LUCKING, RECEIVER OF TAXES OF SAID CITY OF DETROIT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED JUNE 15, 1900.

(17,800.)

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 17, 1900.

1 *Bill of Complaint.*

In the Circuit Court for the County of Wayne.

To the circuit court for the county of Wayne, in chancery:

Your orator, Edward W. Voigt, respectfully shows unto the court:

1. That he resides in the city of Detroit, Wayne county, Michigan, and is and ever since a time prior to the year 1893 has been the owner in fee of the following-described lands situated in the city of Detroit, Wayne county, Michigan, to wit: Lots numbered 2 to 370, inclusive, except lots numbered 96, 340 and 341, of E. W. Voigt's subdivision of the Voigt Park farm, being part of quarter section 36 of the ten-thousand-acre tract, so called, according to the plat thereof on record in the office of the register of deeds for said county, in Liber 18 of Plats, on page 44. That the said plat was made by your orator and recorded in the year 1893, and that thereby a street, designated on said plat as "Second avenue," corresponding in line with a street of that name opened in the condemnation proceedings hereinafter referred to, and of a width of 80 feet, was dedicated by your orator as a public street and highway through said subdivision from north to south, as by said plat, to which reference is made, will more fully appear, and that the street so dedicated has ever since remained and now is a public highway.

2. That subsequently to the making of said plat, and in the year 1898, proceedings were taken by the city of Detroit, in the recorder's court of said city, for the purpose of opening and extending Second avenue from the Grand boulevard west to the northerly city limits, with the width of 80 feet where not already opened, under the general street-opening law, which proceedings resulted in a verdict that the opening of said street as contemplated in said proceedings was a public necessity, that it was necessary to take certain property in said verdict described for that purpose, and awarding damage as compensation for the taking of said property to the amount of $73,732.68. That said verdict was duly confirmed by the court, and that a copy thereof and of the judgment of confirmation was transmitted to the common council of the city of Detroit on the 14th day of June, 1898, and was referred to the committee on street openings. That on the 3d

2 day of January, 1899, said committee on street openings reported, recommending that $49,155.12 of the said award be assessed on a local assessment district and that the balance thereof be paid by the city of Detroit, and that accordingly a resolution was then introduced in and adopted by said common council fixing and determining the property to be included in said assessment district, and including therein the property above described as belonging to your orator, and reciting "that it is hereby determined that the sum of $49,155.12 is a just proportion of the compensation awarded by the jury for the property taken for said improvement which should be paid by the owners" of the property included in said assessment district, and resolving that that amount be assessed and levied upon the several parcels of said property by the board of assessors of the

city of Detroit, all of which, by the proceedings of said common council at the meeting of January 3, 1899, found on pages 979 to 981 of the printed council proceedings of the year 1898, will more fully appear. That your orator had no notice of the intention of said common council to impose and have assessed upon a local assessment district a part of the damages awarded by the jury in said condemnation proceedings, and no notice to appear before said council or any committee thereof in relation to the matter of determining the limits of such district and the amount to be assessed thereon, and that he was given no opportunity to appear and be heard before said common council or any committee thereof with reference thereto.

3. That afterwards, in pursuance of said resolution, an assessment-roll, being street-opening assessment-roll number 111, assessing upon the several parcels of property embraced in said assessment district the amount required by the terms of said resolution, was prepared by the board of assessors of the city of Detroit, and transmitted to the said common council on the 18th day of April, 1899, and was, upon May 9, 1899, confirmed by the said common council. That by the assessment-roll so confirmed there is assessed upon and against the several parcels of property above described as belonging to your orator sums amounting in the aggregate to the sum of $9,951.00. That said roll has been placed in the hands of Thomas M. Lucking, receiver of taxes of the city of Detroit, for collection. That your orator has been notified by the said receiver of the assessments made against his property as aforesaid, and demand has been made upon him by said receiver for the payment thereof. Your orator is informed, verily believes, and avers that unless payment of said assessments is made on or before the 1st day of September, 1899, the said receiver of taxes intends to, and will, unless restrained by this court, advertise for sale and sell the several parcels of real estate belonging to your orator for the amounts assessed thereon as aforesaid.

That said assessments now constitute a cloud on the title of your orator to his said lands.

3 4. Your orator avers further that he is advised by counsel and verily believes that the provisions of the general street-opening law for assessment upon local assessment districts of amounts awarded as damages in condemnation proceedings or a portion thereof, being the provisions contained in section 3406 of the Compiled Laws of the State of Michigan of 1897, are unconstitutional and invalid for the following reasons:

I. Because said law does not provide for giving to the property-owners interested any notice of the proceedings of the common council for the determination of the limits of the local assessment district, and the amount or proportion of the award of the jury to be assessed thereon, and does not provide for the giving to the property-owners interested notice of any hearing by such common council as to the amount of land to be included in such assessment district and as to the amount or proportion of such award to be assessed thereon.

II. Because said law does not fix the basis upon which or the standard by which the common council are to determine what is the

just proportion of the compensation awarded by the jury to be assessed upon the assessment district.

III. Because the said law does not require that the amount of the award of the jury which the common council may order to be assessed upon such assessment district shall not exceed the total amount of the benefits derived by the lands in said district from the improvement to pay the expense of which such award was made.

IV. Because the said law violates the provisions of the fourteenth article of amendments to the Constitution of the United States in that it provides for the taking of property without due process of law.

That the proceedings of said common council, hereinbefore set forth, in determining said assessment district and the amount to be assessed upon it are invalid for the reasons aforesaid and for the further reason that it does not appear by the resolution fixing said district and determining the amount to be assessed thereon upon what basis or standard or by what method the council determined the proportion of the award to be assessed upon said district, or that the amount to be assessed did not exceed the total amount of benefits derived by the property to be assessed from the improvement.

To the end, therefore, that The City of Detroit and Thomas M. Lucking, receiver of taxes, who are made defendants hereto, may appear and answer this bill of complaint, but not under oath (answer under oath being hereby expressly waived); that the said proceedings of the common council of the city of Detroit in constituting said assessment district and fixing the amount to be assessed thereon, and the said assessments made upon the lands of your orator under color of said proceedings may be declared to be null and void; and that the defendants, their counselors and agents, may be perpetually enjoined from advertising for sale and from selling the said lands of your orator; and that your orator may have such further and other relief as the case may require and may be agreeable to equity.

May it please the court to grant to your orator the writ of temporary injunction restraining the defendants from advertising for sale and from selling said lands until the further order of the court, and also the writ of subpœna in the usual form.

And your orator will ever pray, etc.

EDWARD W. VOIGT.

WALKER & SPALDING,
Solicitors for Complainant.

STATE OF MICHIGAN, }
County of Wayne, } ss:

On this fifth day of July, 1899, before the undersigned, a notary public in and for said county, personally appeared Edward W. Voigt, the complainant named in the foregoing bill of complaint, who, being duly sworn, said that he had read said bill, by him subscribed, knew the contents thereof, and that the same was true of his own

knowledge, except matters therein stated on information and belief, and that as to those he believed it to be true.

KITT B. O'MARA,
Notary Public, Wayne Co., Mich.

(Endorsed:) Filed July 10, 1899. John P. Fisher, deputy clerk.

5 In the Circuit Court for the County of Wayne. In Chancery.

EDWARD W. VOIGT
vs.
THE CITY OF DETROIT and THOMAS M. LUCKING, Receiver of Taxes for said City.

Now comes the complainant, by Walker & Spalding, his solicitors, and moves the court that the writ of temporary injunction may issue in the above-entitled cause, directed to the above-named defendants, their counsellors and agents, restraining them and each of them from advertising for sale and from selling the lands of the complainant set forth in the bill of complaint in this cause until the further order of this court. This motion is based upon the following grounds:

1. The unconstitutionality of the law under which the assessment complained of in this cause was made. 2. The invalidity of the resolution of the common council fixing the assessment district and determining the amount to be assessed thereon, being the resolution under which the assessment was made, the reasons for said invalidity being fully set forth in the bill of complaint in said cause, which will be read in support of this motion.

WALKER & SPALDING,
Solicitors for Complainant.

6 (*Chancery Subpœna.*)

STATE OF MICHIGAN, *ss:*

The Circuit Court for the County of Wayne. In Chancery.

Subpœna.

In the name of the People of the State of Michigan to the City of Detroit and Thomas M. Lucking, receiver of taxes for said city, Greeting:

You are hereby notified that a bill of complaint has been filed against you in the circuit court for the county of Wayne, in chancery, by Edward W. Voigt, as complainant, and that if you desire to defend the same you are required to have your appearance filed or entered in the cause, in accordance with the rules and practice of the court, in person or by solicitor, within fifteen days after service of this subpœna upon you. Hereof fail not under the penalty of having said bill taken as confessed against you.

The return day of this writ is the 25th day of July, A. D. 1899.

Witness the Hon. Willard M. Lillibridge, circuit judge, at Detroit, this 10th day of July, A. D. 1899.

WM. H. McGREGOR, *Register*,
By JOHN P. FISHER,
Deputy Register.

WALKER & SPALDING,
Solicitors for Complainant.

Business address: 18 Moffat bldg., Detroit, Mich.

7 STATE OF MICHIGAN, }
County of Wayne, } *ss:*

I hereby certify and return that on the tenth day of July, A. D. 1899, at Detroit, in said county, I served the within writ upon the City of Detroit and Thomas M. Lucking, receiver of taxes of said city, the defendants therein named, by showing the same to Francis A. Blades, controller of Detroit, and to Thomas M. Lucking, receiver of taxes, and at the same time delivering to each of them a true copy of said writ of subpœna.

Dated July 10th, 1899.

G. DUFFIELD STEWART,
Sheriff of said County.
By P. J. HAYES, *Deputy Sheriff.*

Fees, service of writ, $2.00.

(Filed July 14, 1899.
JOHN P. FISHER, *Clerk.*)

8 *Demurrer.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne. In Chancery.

EDWARD W. VOIGT }
vs.
THE CITY OF DETROIT ET AL. }

The defendants say that the complainant has not stated such a case in his bill of complaint as entitles him to relief in a court of equity for the following reasons:

Because said bill alleges as the only grounds for relief that the law under which the condemnation proceedings were had is unconstitutional; whereas these defendants aver that the same is constitutional.

And the further ground that it does not appear upon what basis or standard the common council determined the proportion of the award should be assessed upon the assessment district, or that the amount assessed does not exceed the total amount of benefits derived by the property assessed; whereas these defendants aver that said

determination by the common council does show all that is required by law, and is, therefore, sufficient.

CHAS. FLOWERS,
Solicitor for Defendants.

I hereby certify that I have principal charge of the above-entitled cause in behalf of the defendants, that the demurrer was not interposed for delay, and in my opinion, it is well founded.

C. D. JOSLYN,
Assistant Corporation Counsel, of Counsel for Defendants.

9 *Decree.*

In the Circuit Court for the County of Wayne. In Chancery.

EDWARD W. VOIGT }
vs.
THE CITY OF DETROIT ET AL. }

At a session of said court held at the court-room in the city of Detroit, the 15th day of August, 1899.

Present: The Honorable George S. Hosmer, circuit judge.

This cause came on to be heard upon the bill of complaint and the demurrer of the defendants thereto filed in said cause, and after hearing Walker & Spalding, solicitors for the complainant, and Charles D. Joslyn, assistant city counsel on behalf of the defendants, and it appearing that section 15 of an act to authorize cities and villages to take private property for the use and benefit of the public, being section 3406 of the Compiled Laws of 1897, being the provision of said act under which the assessments and other proceedings set forth in the bill of complaint in this cause were had, is unconstitutional, and that said assessment-roll set forth in said bill and the assessments therein made against the property of the complainant were therefore illegal and invalid:

It is ordered, adjudged and decreed, and the court, by virtue of the authority in it vested, doth order, adjudge and decree that the proceedings of the common council of the city of Detroit in constituting said assessment district set forth in the bill of complaint and fixing the amount to be assessed thereon, and the proceedings for the assessment of the lands belonging to complainant described in the bill of complaint, and the assessments made by street-opening assessment-roll No. 111 upon said lands, to wit, lands situated in the city of Detroit, Wayne county, Michigan, described as lots numbered 2 to 370, inclusive, except lots numbered 96, 340 and 341 of E. W. Voigt's subdivision of the Voigt Park farm, being part of quarter section 36 of the ten-thousand-acre tract, so called, according to the plat thereof of record in the office of the register of deeds for said county, in Liber 18 of Plats, on page 44, are, and the same are hereby declared to be, null and void.

10 It is further ordered, adjudged, and decreed that the defendants, The City of Detroit and Thomas M. Lucking, the receiver of taxes of said city, their counsellors and agents, be and

they hereby are perpetually enjoined from advertising for sale and from selling said lands and from taking any proceedings to enforce said assessments against said lands or any part thereof.

It is further decreed that the complainant recover his costs and expenses of this suit to be taxed.

GEO. S. HOSMER,
Circuit Judge.

JOHN A. SEELY,
Deputy Register.

11 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne. In Chancery.

EDWARD W. VOIGT
vs.
THE CITY OF DETROIT and THOMAS M. LUCKING, Receiver of Taxes.

To the register:

The defendants, The City of Detroit and Thomas M. Lucking, receiver of taxes, hereby claim the benefit of an appeal to the supreme court from a decree heretofore, to wit, on the 17th day of August, 1899, entered in said cause.

Yours, etc.,
CHARLES FLOWERS,
Solicitor for Defendants.

August 19th, 1899.

12 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the sixth day of February, in the year of our Lord one thousand nine hundred.

Present: The Honorable Robert M. Montgomery, chief justice; Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

EDWARD W. VOIGT, Complainant,
vs.
THE CITY OF DETROIT and THOMAS M. LUCKING, Receiver of Taxes, Defendants and Appellants } No. 17767.

This cause coming on to be heard is duly submitted on briefs.

13 Supreme Court of the State of Michigan.

EDWARD W. VOIGT, Complainant and Appellee,
vs.
THE CITY OF DETROIT ET AL., Defendants and Appellants.

Complainant filed a bill to enjoin the collection of a special assessment imposed upon his lands in a special assessment district established by the common council of Detroit, to pay part of the compensation awarded by a jury in proceedings taken to open a street. The

case was heard upon demurrer to the bill. From a decree for complainant defendants appeal.

In 1898 the city of Detroit took proceedings in the recorder's court to open Second avenue, from the boulevard to the northerly city limits. The compensation awarded for the land taken in these proceedings was $73,732.68.

In January, 1899, the common council by resolution determined that $49,155.12 is a just proportion of the compensation awarded by the jury to be paid by the owners of the property embraced in an assessment district established by the same resolution, and directed the board of assessors to make assessment accordingly. Of these proceedings Mr. Voigt had no notice.

The notice required by sec. 37, chapter 11, of the city charter, was duly given. An assessment-roll in accordance with the resolution of the council was prepared and confirmed. There was assessed against land owned by the complainant, in the assessment district established by the council, nearly ten thousand dollars. It is to restrain the enforcement of this tax that the bill is filed.

The statute to be construed reads as follows:

"If the common council or board of trustees, or board of supervisors believe that a portion of the city, village or county in the vicinity of the proposed improvement will be benefited by such improvement, they may, by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon they shall, by resolution, fix and determine the district or portion of the city, or village, or county benefited and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate in proportion as nearly as may, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement. The assessment shall be made and the amount levied and collected in the same
14 manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when a street is graded." Sec. 3406, Compiled Laws 1897.

It is claimed this law is unconstitutional. The law was passed in 1883 and is the one under which the city of Detroit and other cities in the State have been operating in proceedings of a like character to this for many years. Counsel say the precise question involved has never before been passed upon. They urge that three things are required to be done after the confirmation of the verdict of the jury declaring the necessity of the improvement and awarding compensation for the property taken.

1. The common council must determine or fix the local taxing district.

2. It must determine the amount which shall be spread upon the local taxing district.

3. The board of assessors must make an assessment-roll which

shall properly apportion the amount determined by the common council among the different parcels of land in the taxing district.

No provision is made for a notice to property-owners of a time and place of hearing upon either the question of fixing a taxing district or the question of the amount of the award to be spread thereon. This, it is claimed, leads to taking property without due process of law, and therefore the law is unconstitutional.

The statute provides for a hearing in relation to the proportion each piece of property shall bear to the whole cost of the improvement, and the proper notice of this hearing was given.

It is claimed by counsel that complainant was entitled to notice of the hearing relating to the establishment of the assessment district and of the amount of the total assessment, and because the statute does not provide for these notices it is unconstitutional as taking property without due process of law. Citing Thomas *vs.* Cain, 35 Mich., 164; Detroit *vs.* Judges, 112 *id.*, 588; Davidson *vs.* New Orleans, 96 U. S., 107.

We do not think this position of the counsel can be maintained. The right of the legislature to establish special assessment districts in which all the taxes necessary to be raised to pay for a local improvement may be assessed, was for a long time questioned, but that right has been so often sustained by the courts that it is no longer open to question. In the case of The People *vs.* Brooklyn, 4 Comst. (N. Y.), 419, the following language is used:

"But there never was any just foundation for saying that local taxation must necessarily be limited by or coextensive with any previously established district. It is wrong that a few should be taxed for the whole; and it is equally wrong that the whole should be taxed for the benefit of a few. No one town ought to be taxed exclusively for the payment of county expenses, and no county should be taxed for the expenses incurred for the benefit of a single town. The same principle of justice requires that where taxation for any local object benefits only a portion of a city or town that portion only should bear the burden. There being no constitutional prohibition the legislature may create a district for that special purpose, or they may tax a class of lands or persons benefited, to be designated by the public agents appointed for that purpose, without reference to town, county or district lines. General taxation for such local objects is manifestly unjust. It burdens those who are not benefited and benefits those who are not burdened. This injustice has led to the substitution of street assessments in place of general taxation; and it seems impossible to deny that in the theory of their apportionment they are far more equitable than general taxation for the purpose they are designed for."

In Cooley on Taxation, 2 ed., p. 149, this language occurs:

"When the nature of the case does not conclusively fix it, the power to determine what shall be the taxing district for any particular burden is purely a legislative power and not to be interfered with or controlled, except as it may be limited or restrained by constitutional provisions."

"The legislature judges finally and conclusively upon all ques-

tions of policy, as it may also upon all questions of fact which are involved in the determination of a taxing district."

"And having the authority to determine what shall be the taxing districts, the legislature must also be left to its own methods of reaching the conclusion. Most cases will be settled by general law; but taxes for ordinary purposes may require special legislation, or at least may justify it. In such cases it may be proper to enter upon such inquiries into the facts as cannot well be made directly by the legislative body of the State, whose duties are too multitudi-
16 nous to admit of special investigations on a hearing of evidence or on personal examination by its members. Under such circumstances it may be proper and convenient to refer the whole subject to the local authorities; and this, in the case of local works or special improvement, is the course usually adopted. The State does not determine whether a city street shall be improved and a tax levied therefor, but, by provision in the city charter, or by special legislation it refers the whole subject to the city common council, under such directions, regulations and instructions as it may be thought proper or prudent to give or impose. The State does not divide the several counties and towns into school districts and order the construction of district school-houses; but by general law submits the subject to the people specially concerned. This is the general course, and it has been found to be the satisfactory, and therefore the wise course. And if an apportionment is to be made on the basis of benefits to property the local authorities may be and usually are empowered to refer the assessment of benefits to officers or commissioners chosen for the purpose, whose report, when under the provisions of the law it shall become final, will settle the limits of the special taxing district. These, if not the only methods of giving effect to the legislative authority over this subject, are certainly admissible and proper methods."

Under these authorities it is very clear that the legislature itself might have established the special assessment district. Had it seen fit to do so, would it be claimed that its right to do so could be questioned as unconstitutional because no notice was given to the property-holders affected thereby, that it intended to establish such a district? If the answer to this question should be in the negative, why, when the legislature has delegated to the common council of the city the right to establish the special district, should it be said that the law delegating this power is unconstitutional because notice is not required? The establishment of the special assessment district, in the one instance by the legislature and in the other instances by the common council, is the exercise of a legislative power with which the courts will not ordinarily interfere. In Rogers *vs.* St. Paul, 22 Minn., 494, it was held the legislature might submit the question of making a proposed improvement to the decision of the common council, who might avail itself of such sources of information as were accessible to it, like reports of the board of public works; and while the special benefits which will result from the improvement must be as great as the expense of making it, the determination of this question by the council, as well as the whole matter of

ordering the improvement is final, unless perhaps in case of fraud or mistake. The court used the following language:

"As respects taxation, the authority of the legislature is limited only by the constitution and the nature of taxation itself. Cooley on Taxation, ch. 2. It was, therefore, competent for the legislature to give this final and conclusive effect to the determination of the common council—that is to say, it was competent for the legislature to enact that their determination, as a part of the machinery of taxation, should be final and conclusive as respected the question whether a proposed local improvement was of such a character that the amount of taxes necessary to be raised to pay for the expense of making it would exceed the special benefits which would result from its accomplishment." See also Railroad Co. *vs.* Connelly, 10 Ohio St., 159; Spencer *vs.* Merchant, 100 N. Y., 585; same case, 125 N. S. R., 345; Cooley on Taxation, 2nd ed., pp. 606, 611, 661.

17 When the proceeding has reached that stage where it becomes necessary to decide what proportion of the cost of the proposed improvement shall be assessed to any given description of land, there must be an opportunity given to the owner of the land to be heard upon that question.

There is no claim in the bill of complaint that his property is not benefited by the proposed improvement, in excess of the amount assessed, nor is there any claim that he was not allowed to be heard in relation to the amount which should be assessed against his property, thus avoiding the difficulties found in the cases cited by the counsel for complainant. We do not think it can be said that complainant's property is taken without due process of law. This statute has been construed in Beecher *vs.* Detroit, 92 Mich., 268, and Smith *et al. vs.* Common Council, 6 Detroit Legal News, 281, and the action taken by the common council thereunder upheld.

It is said, "The act is bad because it does not fix any rule or standard by which the council are to determine the just proportion of the award of the jury to be assessed upon the district, nor limit the total assessment of the district to the amount of its benefits."

"The constitutional limit of the amount to be imposed upon the district is the total benefit to the district. The law might therefore permit the council, when, in their judgment, a portion of the city in the vicinity of the improvement is benefited thereby, to determine the amount of such benefit and to require a just proportion of the compensation awarded by the jury, not exceeding the total benefit, to be assessed upon such local district. This act contains no such limitation. The council are empowered, when they believe that a local district is benefited, to assess what in their judgment is a just proportion of the whole award upon the district, without requiring that proportion to be limited by the amount of benefit."

We do not think this is a fair construction of the language of the statute. Before the council can create the district at all they must believe that a portion of the city in the vicinity of the proposed improvement will be benefited by such improvement, and then provide for an apportionment of the compensation awarded by the jury upon the property deemed to be benefited. "The amount of the benefit

thus ascertained shall be assessed upon the owners or occupants of such taxable real estate in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement." We think this language makes it clear that the amount of tax which may be assessed upon the district or upon any given parcel of land cannot exceed the benefit. Provision is then made for the assessment levy and collection of the tax. The demurrer should have been sustained.

The decree of the court below is reversed.

J. B. MOORE.
R. M. MONTGOMERY.
FRANK A. HOOKER.
CHAS. D. LONG.
C. B. GRANT.

(Endorsed:) Filed March 27, 1900. Chas. C. Hopkins, clerk.

18 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the twenty-seventh day of March, in the year of our Lord one thousand nine hundred.

Present: The Honorable Robert M. Montgomery, chief justice; Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

EDWARD W. VOIGT, Complainant,
vs.
THE CITY OF DETROIT and THOMAS M. LUCKING, Receiver of Taxes, Defendants and Appellants. } No. 17767.

This cause having been brought to this court by appeal from the circuit court for the county of Wayne, in chancery, and having been argued by counsel, and due deliberation had thereon, it is now ordered, adjudged, and decreed by the court that the decree of the circuit court for the county of Wayne, in chancery, be, and the same is hereby, reversed, vacated, and held for naught, and the bill of complaint dismissed; and it is further ordered, adjudged, and decreed that the defendants do recover of and from the complainant their costs of both courts, to be taxed.

19 To the Honorable Robert M. Montgomery, chief justice of the supreme court of the State of Michigan:

The petition of Edward W. Voigt respectfully shows:

1. That he is the complainant and appellee in a suit in equity commenced in the circuit court for the county of Wayne, of this State, against The City of Detroit and Thomas M. Lucking, receiver of taxes of said city of Detroit, defendants, in which cause a final decree was rendered in said circuit court in favor of the complainant, and which was afterwards appealed to the supreme court of this State by said defendants.

2. That said cause was heard on appeal in the supreme court and

a decree rendered therein reversing the decree and determination of the court below and dismissing the bill of complaint.

3. That it was claimed by the complainant in said suit that the assessment of certain special assessments upon and against certain lands owned by him were invalid because a certain statute of the State of Michigan was unconstitutional and invalid for the reason that it is repugnant to the Constitution of the United States; that said claim was set up in the bill of complaint in said cause, and that the decision thereof by the supreme court of the State of Michigan was in favor of the validity of the said statute.

Wherefore your petitioner prays for an order allowing the issue of the writ of error herewith filed to remove the records in said cause to the Supreme Court of the United States for review and for a citation directed to the defendants in said cause, and that the bond herewith tendered may be duly approved.

Dated May 1st, 1900.

EDWARD W. VOIGT,
By H. E. SPALDING,
His Attorney.

20 [Endorsed:] No. 17767. State of Michigan, supreme court. Edward W. Voigt *v.* The City of Detroit *et al.* Petition for allowance — writ of error. Walker & Spalding, 18–19 Moffat bldg., Detroit, Mich.

21 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the final decree, in a suit which is in the said supreme court of the State of Michigan, before you or some of you, between Edward W. Voigt, complainant and appellee, and The City of Detroit and Thomas M. Lucking, receiver of taxes of said city of Detroit, defendants and appellants, you being the highest court of law or equity of said State in which a decision in said suit could be had, in which suit was drawn in question the validity of a statute of said State of Michigan, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of the validity of said statute, a manifest error hath happened, to the great damage of the said complainant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done

therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of May, in the year of our Lord one thousand nine hundred.

Seal of the Circuit Court, Eastern District of Michigan.

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States for the Eastern District of Michigan.

Allowed by—

R. M. MONTGOMERY,
Chief Justice of the Supreme Court of Michigan.

22 [Endorsed:] No. —. Supreme Court of the United States. Edward W. Voigt, plaintiff in error, *v.* The City of Detroit *et al.*, defendants in error. Writ of error. Walker & Spalding, 18–19 Moffat bldg., Detroit, Mich.

Received and filed May 2, 1900.

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

23 UNITED STATES OF AMERICA, *ss:*

To the City of Detroit and Thomas M. Lucking, receiver of taxes of said city of Detroit, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein Edward W. Voigt is complainant and appellee and you are defendants and appellants, to show cause, if any there be, why the decree rendered against the said complainant and appellee, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert M. Montgomery, chief justice of the supreme court of the State of Michigan, this second day of May, in the year of our Lord one thousand nine hundred.

[Seal of the Supreme Court of Michigan, Lansing.]

R. M. MONTGOMERY,
Chief Justice of the Supreme Court of the State of Michigan.

24 EASTERN DISTRICT OF MICHIGAN, } *ss:*
County of Wayne, }

On this 3rd day of May, in the year of our Lord one thousand nine hundred, personally appeared David H. Matthews before me, the subscriber, a notary public in and for said county, and makes oath that he delivered a true copy of the within citation to William C. Maybury, the mayor of the city of Detroit, and also a like copy of

said citation to Thomas M. Lucking, receiver of taxes of said city of Detroit, on the day and year last above written.

DAVID H. MATTHEWS.

Sworn to and subscribed the 3rd day of May, A. D. 1900.

KITT B. O'MARA,
Notary Public for said County in said District.

[Endorsed:] Original. No. —. Supreme Court of the United States. Edward W. Voigt, plaintiff in error, *v.* The City of Detroit *et al.*, defendants in error. Citation. Filed June 4, 1900. Chas. C. Hopkins, clerk.

25 Supreme Court of the United States.

EDWARD W. VOIGT, Plaintiff in Error,
v.
THE CITY OF DETROIT and THOMAS M. LUCKING, Receiver of Taxes of said City of Detroit, Defendants in Error.

Assignments of Error.

Now comes the said Edward W. Voigt, complainant and plaintiff in error, by Hoyt Post, his solicitor, and says that in the record and proceedings aforesaid and in the judgment and decree of the supreme court of the State of Michigan in said cause there is manifest error, as follows, to wit:

1. That the said court erred in reversing the decree of the court below and dismissing the complainant's bill of complaint because in and by said bill of complaint and in said suit there was drawn in question the validity of a statute of the State of Michigan, being section 3406 of the Compiled Laws of the State of Michigan of the year 1897, on the ground of its being repugnant to the 14th article of the amendments to the Constitution of the United States, in that it provides for the taking of property without due process of law, and because the said judgment and decree of the said supreme court was a decision in favor of the validity of said statute.

2. That the said court erred in reversing the decree of the court below and dismissing the complainant's bill of complaint because in and by said bill of complaint and in said suit was drawn in question the validity of said statute of the State of Michigan, being section 3406 of the Compiled Laws of the State of Michigan of the
26 year 1897, on the ground of its being repugnant to the 14th article of the amendments to the Constitution of the United States, in that it denies the equal protection of the laws to the owners of property assessed under the provisions of said statute, and so denied the equal protection of the law to the complainant, and because the said judgment and decree of the said supreme court was a decision in favor of the validity of said statute.

3. The said court erred in reversing the decree of the court below and dismissing the complainant's bill of complaint because in and

by said bill of complaint and in said suit was drawn in question the validity of the proceedings taken, resulting in an assessment upon the lands of the complainant, as set forth in the bill of complaint, which proceedings were an exercise of authority under the State of Michigan, upon the ground that the said proceedings were repugnant to the 14th article of the amendments to the Constitution of the United States, in that they amounted to the taking of property without due process of law, and to a denial of the equal protection of the laws to the complainant, and because the said judgment and decree of the said supreme court was a decision in favor of the validity of said proceedings.

Whereas by the law of the land the said judgment and decree of said supreme court should have been given for the said Edward W. Voigt, complainant, and against the said City of Detroit and Thomas M. Lucking, receiver of taxes of said city of Detroit, defendants, and should have affirmed the decree of the court below, and the said Edward W. Voigt prays that the said judgment and decree may be reversed and annulled, and that a decree may be entered establishing and declaring the invalidity of said statute and proceedings.

HOYT POST,

Solicitor for Complainant and Plaintiff in Error.

27 [Endorsed:] No. —. Supreme Court of the United States. Edward W. Voigt, plaintiff in error, *v.* City of Detroit *et al.*, defendants in error. Assignments of error. Filed May 24, 1900. Chas. C. Hopkins, clerk.

28 Know all men by these presents that we, Edward W. Voigt, of the city of Detroit, Wayne county, Michigan, as principal, and Emil Landsberg and Henry Zimmermann, of the same place, as sureties, are held and firmly bound unto the City of Detroit and Thomas M. Lucking, receiver of taxes of said city of Detroit, in the full and just sum of one thousand dollars, to be paid to the said city of Detroit and Thomas M. Lucking, receiver of taxes of said city of Detroit, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of May, in the year of our Lord one thousand nine hundred.

Whereas lately, at a session of the supreme court of the State of Michigan in a suit pending in said court wherein the said principal obligor was complainant and appellee and the said obligees were defendants and appellants, a decree was rendered against the said complainant, dismissing his bill of complaint, and the said obligor having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said City of Detroit and Thomas M. Lucking, receiver of taxes, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said

Edward W. Voigt shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

EDWARD W. VOIGT. [SEAL.]
EMIL LANDSBERG. [SEAL.]
HENRY ZIMMERMANN. [SEAL.]

Sealed and delivered in presence of—
MENZO ZIMMERMANN.
HOWARD WHELAN.

Approved by—
R. M. MONTGOMERY,
Chief Justice of the Supreme Court of the State of Michigan.

29 EASTERN DISTRICT OF MICHIGAN, } ss.:
County of Wayne, }

Emil Landsberg and Henry Zimmermann, being first duly sworn according to law, depose each for himself as follows: I am the same person whose name is subscribed to the foregoing bond as one of the sureties therein, and I state that I am worth the sum specified as a penalty thereof, over and above all my just debts and liabilities, exclusive of property which is exempt from execution.

EMIL LANDSBERG.
HENRY ZIMMERMANN.

Subscribed and sworn to before me this first day of May, 1900.
HOWARD WHELAN,
Notary Public for said County of Wayne.

(Endorsed:) Filed May 2, 1900. Charles C. Hopkins, clerk.

30 Parties.	Pl'tf's attorneys.	Def't's attorneys.
Edward W. Voigt, complainant, *vs.* The City of Detroit and Thomas M. Lucking, receiver of taxes, defendants and appellants.	Walker & Spalding. Hoyt Post. Appeal from Wayne, in chancery.	Charles Flowers.

Journal.	Date.	Hosmer, J.—Proceedings.
	1899.	
	Sept. 18	Record on appeal filed.
	" 19	Notice of appeal and proof of service filed.
	" 27	Note of argument filed.
	1900.	
P. 642 ...	Feb. 6	Submitted on briefs.
Q. 54 ...	Mar. 27	Reversed and bill dismissed; costs of both courts.
	May 2	Writ of error from Supreme Court of the United States received and filed. Allowed by Montgomery, C. J.
	" "	Bond, duly approved, filed.
	" "	Petition for writ filed.
	June 4	Citation, with proof of service, filed.
	" 13	Return made to writ of error.

31 Supreme Court of the State of Michigan.

EDWARD W. VOIGT, Plaintiff in Error,
vs.
THE CITY OF DETROIT and THOMAS M. LUCKING, Receiver of Taxes of the City of Detroit, Defendants in Error.

STATE OF MICHIGAN, *ss:*

In Supreme Court.

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decisions and reasons therefor, signed by the judges of said court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the originals and it is a true transcript therefrom and of the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon, the citation, with proof of service endorsed thereon, the assignments of error, and a copy of the bond to the adverse party filed with the writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at the city of Lansing, this thirteenth day of June, in the year of our Lord one thousand nine hundred.

Seal of the Supreme Court of Michigan, Lansing.

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No., 17,800. Michigan supreme court. Term No., 315. Edward W. Voigt, plaintiff in error, *vs.* The City of Detroit and Thomas M. Lucking, receiver of taxes of said city of Detroit. Filed June 15th, 1900.

No. 83

Brf. of Spalding & Post for Pltf. in Err.

Supreme Court
FILED
DEC 6 19
JAMES H. McKENNEY
C

SUPREME COURT OF THE UNITED STATES.

Filed Dec. 6. 1901.

EDWARD W. VOIGT
Plaintiff in Error,

vs.

THE CITY OF DETROIT and THOMAS M. LUCKING, Receiver of Taxes,
Defendants in Error.

No. ~~15,000~~ 83.

Error to the Supreme Court of the State of Michigan.

BRIEF OF H. E. SPALDING, COUNSEL FOR PLAINTIFF IN ERROR.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1901.

SUPREME COURT OF THE UNITED STATES.

EDWARD W. VOIGT
Plaintiff in Error,

vs.

THE CITY OF DETROIT and
THOMAS M. LUCKING, Receiver of Taxes,
Defendants in Error.

No. 17,800.

Error to the Supreme Court of the State of Michigan.

BRIEF OF H. E. SPALDING, COUNSEL FOR PLAINTIFF IN ERROR.

This is a writ of error to the Supreme Court of the State of Michigan to review its decision sustaining a special assessment laid upon lands of Mr. Voigt, in the City of Detroit, to defray part of the expense of opening a public street. The assessment was attacked upon the ground that the proceedings taken therefor and the statute authorizing those proceedings violated that part of the Fourteenth Amendment to the Constitution of the United States, which forbids any State to deprive any person of property without due process of law.

The statute in question is the act authorizing cities and villages to take private property for public use by condemnation proceedings.

1 Mich. Comp. Laws of 1897, Secs. 3392-3435.

This Act provides for judicial proceedings in which the necessity of taking any property sought to be acquired for public purposes and the compensation to be paid therefor are determined by the verdict of a jury. To these proceedings the municipality and those interested in the property to be taken are the only parties. The compensation awarded is paid by the municipality.

The part of the law attacked is the provision for reimbursement of the municipality, which is as follows: "If the Common Council, or Board of Trustees, or Board of Supervisors, believe that a portion of the city, village or county in the vicinity of the proposed improvement, will be benefited by such improvement, they may by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon they shall, by resolution, fix and determine the district or portion of the city, (or) village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion as nearly as may, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement. The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when a street is graded. The assessment roll containing said assessments, when ratified and confirmed by the Common Council, Board of Trustees or Board of Supervisors, shall be final and conclusive, and prima facie evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained shall be and continue a lien on the premises on which the same is made until payment thereof. Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided shall be assessed, levied and collected upon the taxable real estate of the municipality, the same as other general taxes are assessed and collected in such city, village or county."

1 Comp. L. of 1897, Sec. 3406.

Mr. Voigt filed a bill on the equity side of the State court of original jurisdiction to set aside and annul a street opening assessment made on his lands under this Act. The case comes up upon a demurrer to the bill for lack of equity, and a decree sustaining the demurrer and dismissing the bill.

It appears by the bill that the City of Detroit opened a street known as Second avenue by condemnation proceedings, in which the amount awarded was about $74,000. This street was already open through Mr. Voigt's lands by

his dedication. Acting under the section of the statute above quoted, the Common Council determined, by resolution, that there should be assessed upon a local assessment district established by the same resolution, the sum of $49,155.12 as "a just proportion of the compensation awarded by the jury which should be paid by the owners" of the property in the assessment district. This district includes the lands of Mr. Voigt. He had no notice of these proceedings of the council and no opportunity of hearing upon the determination of the limits of the district, the inclusion of his property therein, and the amount to be assessed upon the district. Of the total amount imposed upon the district by the determination of the council $9,951 was apportioned to and assessed upon his lands by the Board of Assessors.

It is admitted that these proceedings comply with the statute.

The errors on which we rely are:

1. That the Supreme Court of Michigan erred in sustaining the statutory provisions above cited against the objection that they are repugnant to the Fourteenth Amendment to the Constitution of the United States, in that they provide for the taking of property without due process of law.

2. That said court erred in sustaining the assessment proceedings under said statutory provisions against the objection that they are repugnant to the said constitutional amendment, in that they amount to a taking of property without due process of law. (Record, pp. 15, 16.)

ARGUMENT.

Under the statute, the council determine according to their own discretion, finally and without giving notice or opportunity of hearing to any of the parties interested:

(a) What property is specially benefited by the improvement and what is not.

(b) Whether the whole, and if not the whole, what part, of the cost of the improvement shall be borne by the property benefited.

The assessors merely apportion the amount so determined upon the several parcels of land in the prescribed district in proportion to benefits.

The owner has an opportunity of hearing before the assessors, but only upon the question of apportionment.

He may show that his lot is assessed in an undue proportion as compared with the others, but nothing else.

Though it could be demonstrated that property specially benefited has been omitted from the district, that the amount assessed exceeds the entire benefit to the district, and that every lot is assessed for more than its benefit, these questions are concluded by the ex parte determination of the council.

The objections to the Act are two.

First. That it does not afford to the property owner notice and opportunity of hearing upon the questions of what lands, if any, are specially benefited by the improvement, and therefore to be included in the assessment district, and what is the amount of the special benefit, and therefore the maximum amount to be paid by the district.

Second. That it does not require the amount imposed upon the district to be limited to the amount of special benefit.

I submit upon the first question this proposition.

The function of the council in determining whether any and what property is especially benefited by the improvement and the amount of the benefit is not legislative, but quasi-judicial, and cannot constitutionally be exercised without notice and opportunity of hearing to the property owners upon the several matters to be determined.

That the basis of special assessments is special local benefit, and that such assessmnets are to be in proportion to and not in excess of such benefits is indisputable. The law must, therefore, provide means to insure that all the property benefited, and none other shall be assessed and that assessments shall not exceed benefits. The points in contest have been and are, by what authorities and under what safeguards for individual rights may the questions of benefit constitutionally be determined.

It is said by Judge Cooley, in an often quoted opinion upon special assessments, "that parties whose property is to be taken under summary tax proceedings are entitled as of right to be heard at some stage of the proceedings before the tax shall become an established charge against them or their property."

Thomas vs. Gain, 35 Mich., 135, 164.

A hearing, then, of some sort is a constitutional requirement. The question is upon what the party is to be heard. As the object of the hearing is protection against an unwarrantable or excessive imposition, that hearing should

be upon all matters necessary to make such protection adequate, that is, upon all the points involved in determining the amount of the assessment.

The property owner is interested in three things:

First, the size of the district—to see that his property be not included unless specially benefited, and if it be included, that all other property similarly benefited be also included.

Second, the amount of the total assessment—to the end that the district be not assessed in excess of its benefits.

Third, and after the settlement of the first two questions, he is interested in the apportionment of the amount upon the district— to the end that his assessment be not disproportionate to that of the other property owners. The statute here in question provides a hearing upon the last, but denies him the right to be heard on either of the first two points.

All of the important decisions of this court were reviewed in the cases of *Norwood vs. Baker*, 172 U. S., 269; *French vs. Barber Asphalt Co.*, 181 U. S., 324, and *Wight vs. Davidson*, 181 U. S., 371.

The first of these cases was upon a street opening assessment made under a statute giving the council discretionary power to defray the cost of street improvements wholly or in part by general taxation, and to impose so much thereof as is not raised by general tax upon the benefited property, whether abutting or not, either in proportion to benefits or according to value or by the front foot. The assessment complained of was made under a village ordinance directing the assessment in this case to be made on the abutting property by the front foot. The effect was to impose on the property owner, without opportunity of hearing, the entire amount received for the land previously taken, plus the expense of condemnation. The choice of methods given the council was exercised without hearing; but it will be observed that the State legislature had not made any determination, general or specific, that the frontage rule should be followed.

In *French vs. Barber Asphalt Co.* the legislature had determined by the city charter that street paving should be paid for by assessment upon the abutting property by the front foot. An assessment so made was sustained, as it appeared that the pavement was uniform in character and quality and the abutting lots in value.

Wight vs. Davidson arose on a special Act of Congress, providing for opening a street in the District of Columbia by judicial proceedings, and the assessment of at least one-half the expense by a jury upon the property found to be benefited. All persons assessed had notice by publication of the proceedings, and opportunity to be heard therein. The assessment was sustained on the ground that it was within the legislative power of Congress to determine the amount of the special benefit from opening the street and require it to be paid by the benefited property.

I understand the following points to be determined by these cases.

1. That in absence of a determination by the State legislature a municipal council may not impose the cost of a street improvement upon the abutting property in proportion to frontage without affording to the owners an opportunity of hearing on the question of benefits.

2. That the legislature may require the whole or any part of the expense of a street improvement such as paving to be defrayed by assessment upon the abutting property in proportion to frontage.

3. That the legislature may require the whole or any part of the expense of a local improvement, such as a street opening, to be defrayed by assessment upon the property benefited in proportion to benefits.

The questions open under these cases and here material are:

(a) Whether the fact that the apportionment upon the district is to be made according to benefits instead of frontage avoids the necessity of giving a hearing to parties in interest on the preliminary questions of what property is benefited and how much.

(b) Whether the determination by a municipal council of what property is specially benefited and the amount of benefit without hearing the parties in interest is equally conclusive as is a like determination by the legislature.

No question of the effect of a legislative determination of property benefited and amount of benefit arises. The legislature determined nothing by the Act here in question, except that the apportionment upon the district should be in proportion to benefits. All other questions are remitted to the discretion of the Common Council.

It may be suggested that the ground of decision in *Norwood vs. Baker* was that the discretionary power of assessment was there abused by imposing an assessment substantially exceeding the special benefit, and that the case is,

therefore, consistent with the existence of general power in a municipal council to make such assessments by frontage without hearing those interested. On this theory every case would turn on the question whether there was or was not an assessment in substantial excess of benefit, and proof of such excess would be necessary to relief. But, while on the facts in *Norwood vs. Baker* an excess appeared probable, the complainant did not show nor offer to show that the assessment, in fact, exceeded benefits, but attacked the proceedings because they were taken without inquiry as to benefits, and that the entire assessment was illegal.

Opinion, pp. 290-1, 293-297.
Dissenting opinion, pp. 300-302.

In *Wight vs. Davidson*, decided with *French vs. Barber Asphalt Co.*, it was said of the Norwood case that "there having been no legislative determination as to what lands were benefited, no inquiry by the village council and no opportunity afforded to the abutting owner to be heard on that subject, this court held that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefit * * * is to the extent of such excess a taking * * * without compensation and accordingly affirmed the decree" setting aside the assessment.

See Opinion, pp. 384-5.

This sufficiently shows that the decision was based on the violation of principle in assessing without hearing.

The individual property owner is interested in the determination of every question that affects the amount of his assessment. Where the apportionment is according to benefits, these questions are

1. What property is specially benefited by the improvement.

2. What is the gross benefit to all property specially benefited.

3. What proportion of this gross benefit accrues to the individual piece of property.

Each of these questions is one of fact to be determined upon evidence of the situation and condition of individual pieces of property in the locality of the improvement, and the effect of the improvement upon each. Upon each question an opportunity of hearing is important to the owner.

The fact that the apportionment is to be by benefits instead of by frontage renders a hearing necessary on relative benefits, but does not lessen the importance of a hearing on the other questions. All who are charged may be overburdened, and some property chargeable may escape, though as between those charged the load may be equitably distributed.

The frontage rule of apportionment may be—in most cases of improvement to an existing street is—a just rule, benefits usually being substantially proportionate to frontage. Had the apportionment in the Norwood case been according to benefits instead of frontage, the result would have been practically the same. It is clear that the fact that the frontage rule had been there adopted was without significance.

The question, then, is whether a municipal council can constitutionally be empowered to determine, without hearing the parties in interest, what property is specifically benefited and how much, and accordingly, what proportion of the cost of the improvement shall be borne by such property. This depends upon whether the determination is an act of legislative power.

Upon principle it is not, but quasi-judicial. The constitutional justification for special assessments being that they depend upon and cannot exceed special benefits, the determination rests not on considerations of public policy as do the levying of general taxes and the apportionment of public burdens among the constituent parts of the general body politic, but upon the local effects, absolute and relative, of a particular improvement upon specific individual properties. It is the right of each local proprietor not to be assessed unless benefited, nor beyond his benefit, nor disproportionately to others, and that the burden should be apportioned upon all similarly situated. In each case the question is one of private right and distributive justice. It is to be observed also that, while in questions of general taxation the legislature has absolute discretion in fixing the amount of revenue and the sources from which it is to be derived, yet before a tax can become an established charge against an individual he has a constitutional right to be heard on all matters by which he is peculiarly affected, for example, the valuation of his property.

Cooley on Taxation, 361-3.

And it is for this reason that the distinction is taken on the right of hearing between specific taxes and those based on valuation.

Hagar vs. Reclamation District, 111 U. S., see 709-710.

Conceding for the purpose of this argument that a like determination by the State legislature is conclusive, that is because when a discretion is vested in the legislature its review by the courts, whether the power be legislative in character or not, is thought to involve an encroachment by the judicial upon the legislative department. This consideration does not apply where the power is vested in a local municipal body.

It is settled that if such a power be vested in a body which has not the legislative function, it is quasi judicial, and therefore can only be exercised after notice and opportunity for hearing to all affected by the exercise.

Where the legislature delegates to a board or officer a duty involving discretion and affecting individual rights, notice is required, though the legislature itself might have acted without.

Re Currie, 54 N. Y. Supp., 917.
Parsons vs. District of Columbia, 170 U. S., 45, 52.

This is recognized in

Spencer vs. Merchant, 125 U. S., 345, 356.

"Wherever the principle is adopted that assessments for local improvements can be justified only to the extent of special benefits actually received and must be apportioned accordingly, or wherever the apportionment or its basis has not been fixed by the legislature, although within its competency to do so, in either case the question of the existence and the extent of benefits becomes in its nature judicial, and not merely administrative, in such a sense that the property owner is entitled to a hearing or to notice or an opportunity to be heard."

2 Dill. Mun. Corp., Sec. 802a.

Due process of law "must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought."

Hagar vs. Reclamation District, 111 U. S., 708.

Hearing is equally needful for protection whether private rights are to be affected by the decision of a Common Council or by that of a purely administrative board or officer.

The character of the power remains the same wherever vested.

This was recognized when the question was on the power of the board of supervisors of the city and county of San Francisco to fix water rates to be charged by a private corporation in

> Spring Valley Water Works vs. Shottler, 110 U. S., 347,

the court saying: "Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature." (See p. 354.) This Board of Supervisors was the local legislative body.

> See acts collected 4 Deering's Annotated Codes and Statutes of California: Penal Code and Statutes in Force, under head "San Francisco City and County," p. 667.

In *Fallbrook Irrigation District vs. Bradley, 164 U. S., 112*, an irrigation act of the State of California was attacked as not permitting those whose lands were sought to be included in the assessment district to be heard on the question whether they were benefited before the Board of County Supervisors who established the district. The court, while holding that the principle contended for did not apply because such hearing was provided, conceded that it was sound, saying that the legislature has power to fix such a district for itself without any hearing as to benefits. "But when, as in this case, the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some *tribunal* (the Board of Supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the land-owner has the right to be heard upon that question before his property can be taken." (See pp. 174,-75, also p. 169.)

The Board of Supervisors is in California the legislative body of the county.

Constitution of California, Act. 14, Sec. 1.
Deering's Political Code of California, Sec. 4022 et seq. especially Secs. 4045, 4046.

Though it also has certain administrative and judicial powers.

People vs. Supervisors, 8 Cal., 58.
Waugh vs. Chauncey, 13 Cal., 11.
Sewer Dist. vs. Farmer, 101 Cal., 178.
Belser vs. Hoffschnider, 104 Cal., 455.

Clearly it does not follow that a power is legislative because it is vested in a body having some legislative power. The procedure and safeguards necessary to the constitutional exercise of a power are to be determined from the character of the power itself, not from that of its depositary. The governing body of a municipality, usually called the Common Council, exercises in general all the powers of the incorporated place.

1 Dill Mun. Corpn., Sec. 242.

It has, in the absence of restraint, an implied power to amove corporate officers whether elected by itself or by the people.

Ibid, Sec. 243.

So a charter provision vesting in the board of Aldermen power to try impeachments of city officers is not unconstitutional as authorizing the exercise of judicial power.

Ibid, Sec. 244, and cases cited.

The Common Council of the City of Detroit, like common councils generally, and like the Board of Supervisors in California, is a body exercising powers of different classes, legislative, administrative and quasi-judicial. Its charter (Local Acts of the State of Michigan of 1883, p. 579) contains, among others, the following provisions:

The powers of local government possessed by the city are divided into two departments, the legislative and administrative. No person or body belonging to one department shall exercise powers properly belonging to the other, except in cases expressly provided for in this Act. (Chap. 1, Sec. 2).

The Common Council has the legislative power of the city. (Chap. 7, Sec. 1.)

It has, among other powers not of a legislative nature, the following: On the Mayor's nomination it appoints the board of assessors, controller, board of public works, and members of other city commissions. (Chap. 4, Sec. 2.) Without the concurrence of any other city officer, it appoints market clerks, pound masters, election inspectors and others. (Chap. 4, Sec. 3.)

By a two-thirds vote it may remove, on charges made and after hearing in defense, any elective officer of the city, except the Mayor of the city and recorder, for malfeasance in office or neglect of duty. Provision is made for trial of such charges before the council and for compulsory attendance of witnesses. (Chap. 4, Sec. 18.)

It determines appeals taken by persons considering themselves aggrieved from assessments determining valuations for taxation made by the Board of Assessors. On such appeal the council may increase or diminish the assessment as they see fit, but shall not increase without opportunity for hearing to the persons affected. (Chap. 10, Secs. 7 and 8.) See upon the character of the above proceeding

Michigan Savings Bank vs. Detroit, 107 Mich., 246.

Detroit Savings Bank vs. Detroit, 114 Mich., 81.

It may order the taking down of buildings in its opinion unsafe, and in default thereof cause a removal by the city. (Chap. 5, Sec. 16.)

It may abate and remove a nuisance, and for that purpose, in its discretion, fill up and level or drain any lot or premsies. (Chap. 7, Sec. 42.)

It audits and allows all claims against the city. No action can be brought against the city unless the claim has been previously presented to the council. (Chap. 5, Sec. 17.)

Springer vs. Detroit, 102 Mich., 300.

No contract for any work or supplies for the city can be made without its approval and confirmation. (Chap. 11, Sec. 8.)

It has control of all corporate property with power to lease, sell and convey it, and may purchase real estate for corporate use. (Chap. 7, Secs. 23 and 411.)

When a power judicial in its nature is vested in a body of this character, exercising power belonging to all three departments of government, it is not reasonable to hold that such judicial power can be exercised without judicial safeguards.

If the above statement from the opinion in the Fallbrook case be correct, such a power cannot be constitutionally exercised by any body having legislative powers except the State legislature without opportunity of hearing to the land owner. The same passage was cited with approval in *French vs. Barber Asphalt Co.*

It may be said that these statements quoted from the decisions of this court were not essential to the decisions. Their principle, however, which is that of the proposition we maintain, is necessarily implied in the decision of the Norwood case, whether that case is taken as interpreted either by the majority or by the minority of the court in *French vs. Asphalt Co.* and *Wight vs. Davidson.*

In the Norwood case the legislature had determined nothing, but had given the village council power to defray the cost of street improvements, either by general taxation, a special assessment, or partly by each method. In case of special assessment, it might assess by benefits, value or frontage, and upon all property benefited or upon the property abutting only. The council did determine to assess the whole cost by frontage on abutting property.

This decision is evidently inconsistent with the theory of conclusive legislative determination by a municipal council. It is claimed by the dissenting opinion in *French vs. Asphalt Co.* to be authority for the proposition that even a State legislature may not conclude the property owner by a determination that the entire cost of an improvement shall be borne by the property in the locality without inquiry as to benefits. The court holds, however, in the French case that the State legislature may require the cost of a local improvement to be assessed against abutting property without hearing on benefits. In *Wight vs. Davidson* the same majority who decide the French case, affirming the same rule as to the legislative power of Congress, distinguish the Norwood case, because in that case there had been no legislative determination as to what lands were benefited, and no inquiry made by the village council and no opportunity afforded the abutting owner to be heard on that subject.

Opinion of Court, 384-5; Dissenting Opinion, 387.

A municipal council, then, like any other tribunal upon which the power to determine the lands benefited and the amount of benefit is conferred by the legislature, does not, in making that determination, exercise legislative power, and must give the property owner interested notice and an opportunity of hearing on the questions involved.

The statute does not require the amount imposed on the district by the council to be limited to the amount of special benefit. It provides that if the Common Council believe that a local district is benefited, they may determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the real estate deemed to be thus benefited.

The Supreme Court of Michigan construed this provision as limiting the assessment to the benefit, apparently because the amount fixed by the council is to be apportioned among the several parcels of land in the district in proportion to the advantages they acquire from the improvement. (Record, pp. 11, 12.)

That special benefit is the constitutional limit of special assessment, see *Norwood vs. Baker, 172 U. S., 269.*

As no such limitation is expressed, the question is whether it is fairly implied.

Under the statute, the right to impose a special assessment is predicated upon the belief of the council that a part of the city in the vicinity of the improvement will be benefited by the improvement. This authorizes a special assessment where there is no other benefit than that common to the general public. So the apportionment upon the district is to be in proportion to the advantage which the lots are deemed to acquire, without limitation to special advantage.

The amount which the council may require to be specially assessed is "any just proportion" of the entire award. What the just proportion is the council is to determine. Is it the same thing to empower them to impose what they deem as between the city and the assessment district a just proportion, and to impose an amount not exceeding the special benefit to the district? The limitation to "any just proportion" fixes no standard of determination. It leaves it in each case to the uncertain fluctuations of individual opinion unguided and unchecked.

In a case where the Common Council were empowered to construct sidewalks and assess upon the owners of the abutting property so much of the expense as the council should deem just and equitable, the statute was held unconstitutional, because the limitation to the proportion of expense deemed just and equitable by the council did not import with reasonable certainty a limitation to the amount of the benefit. The court say that for the protection of the taxpayer's constitutional rights the statute should fix such a standard of assessment, and that as it

does not, it cannot be determined upon what basis the council proceeds.

Barnes vs. Dyer, 56 Vt., 469.

A statute authorizing sewer commissioners, after ascertaining the cost of the sewer, to assess it against the parcels drained in such proportion as they deem just and equitable, was held unconstitutional on the same ground.

New Brunswick Rubber Co. vs. Commissioners, 38 N. J. L., 190.

So the provision of a liquor law allowing a local board to refuse approval of a bond, tendered by any person whose character and habits in their opinion rendered him unfit to conduct the liquor business, was held bad. The court say "where there is no standard laid down, there may be as many scales of fitness and unfitness as there are boards. * * * If the statute had fixed the rule, there would be means of protecting parties against caprice and condemnation unheard, but when the same persons are to be judges of the proper causes of rejection as well as of the fitness of persons under such causes, the law subjects every one to the mere will of his neighbors and gives him no rights whatever. No man's rights can be submitted under a constitutional government to the discretion of any body."

Robinson vs. Miner, 68 Mich., 549, see pp. 555, 556.

I submit that the decision of the Supreme Court of Michigan should be reversed and a decree entered in accordance with the prayer of the bill.

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Of Counsel for Plaintiff in Error.

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Of Counsel.

No. 83.

SEP 9 19

JAMES H. McKENNEY

Brief of Tarsney for D. E.

UNITED STATES OF AMERICA

Filed Sept. 9, 1901.

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1901.

EDWARD W. VOIGT,
Plaintiff in Error.

vs.

THE CITY OF DETROIT and THOMAS M. LUCKING, Receiver of Taxes for said City of Detroit,
Defendants in Error.

83

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF FOR DEFENDANTS IN ERROR.

TIMOTHY E. TARSNEY, Corporation Counsel,
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DETROIT:
THE THOS. SMITH PRESS, 42-44 LARNED ST., W
1901.

SUPREME COURT

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THOMAS M. LUCKING,
Receiver of Taxes for said City of Detroit,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF FACTS.

The Plaintiff in error is the owner of certain real estate, situate in the city of Detroit. In the year 1898, proceedings were taken by the city in the Recorder's Court for the purpose of opening and extending Second Avenue, from the Grand Boulevard west to the northerly city limits; which proceedings resulted in a verdict that the opening of the street as contemplated in said proceedings, was a public necessity, and that it was necessary to take certain property in said verdict described for

that purpose, and awarding damages as compensation for the taking of said property to the amount of $73,732.68. That said verdict was duly confirmed by the court, and that a copy thereof and of the judgment of confirmation was transmitted to the Common Council of the City of Detroit, on the 14th day of June, 1898, and was referred to the Committee on Street Openings. On the 3d day of January, 1899, said Committee on Street Openings reported and recommended that $49,155.12 of said award be assessed on a local assessment district, and that the balance thereof be paid by the City of Detroit, and that, accordingly, a resolution was then introduced in and adopted by the said Common Council fixing and determining the property to be included in said assessment district, and including therein, the property of the Plaintiff in error and reciting that "it is hereby determined that the sum of $49,155.12 is a just proportion of the compensation awarded by the jury for the property taken for said improvement, which should be paid by the owners" of the property included in said assessment district, and resolved that that amount be assessed and levied upon the several parcels of said property, by the Board of Assessors of said city.

Record, p. 1.

In pursuance of said resolution, an assessment roll, assessing upon the several parcels of property embraced in said assessment district was prepared by the Board of Assessors of the City of Detroit, and transmitted to the Common Council on the 18th of April, 1899, and was afterwards, on May 9, 1899, confirmed by said Common Council; that by said assessment roll so confirmed, there is assessed upon and against the several parcels of property of the Plaintiff in error, sums amounting in the aggregate to the sum of $9,951.

Record, p. 2.

Plaintiff in error attacks such assessment, not upon the ground that any irregularity appears in the proceedings looking thereto, but solely upon the ground of the alleged unconstitutionality of the Act of the Legislature of the State of Michigan, under which such proceedings looking to the opening of said street were taken.

He alleges that he is advised, and verily believes that the provisions of the general street opening law for asssessment upon local assessment districts of amounts awarded as damages in condemnation proceedings or a portion thereof, being the provisions contained in section 3406 of the Compiled Laws of the State of Michigan, of 1897, are unconstitutional and invalid for the following reasons:

I. Because said law does not provide for giving to the property owners interested any notice of the proceedings of the Common Council for the determination of the limits of the local assessment district, and the amount or proportion of the award of the jury to be assessed thereon and does not provide for the giving to property owners interested notice of any hearing by such Common Council as to the amount of land to be included in such assessment district or the proportion of such award to be assessed thereon.

II. Because said law does not fix the basis upon which or the standard by which the Common Council are to determine what is the just proportion of the compensation awarded by the jury to be assessed upon the assessment district.

III. Because said law does not require that the amount of the award of the jury which the Common Council may order to be assessed upon such assessment districts shall not exceed the amount of the benefits derived by the land in said district from the improvement to pay the expense of which such award was made.

IV. Because said law violates the provisions of the 14th article of amendments to the Constitution of the United States in that it provides for the taking of property without due process of law.

Record, pp. 2-3.

To the Complainant's bill of complaint, the Defendants demurred.

Record, pp. 5-6.

Afterwards, on the 15th day of August, 1899, said cause came on to be heard before the Honorable George S. Hosmer, one of the Circuit Judges of the Circuit Court for the County of Wayne, and a decree was entered therein in favor of the Plaintiff in error.

Record, pp. 6-7.

From this decree Defendants appealed to the Supreme Court of the State of Michigan, which said court, on March 27, 1900, filed an opinion reversing the decree of the court below, sustaining the validity of said law. The opinion of the Supreme Court of Michigan is printed in full in the record, pp. 7-12.

Whereupon, Plaintiff in error sued out a writ of error from this court.

The law under which these proceedings were had and which is involved in this suit, is "An Act to authorize cities and villages to take private property for the use and benefit of the public, and to repeal Act No. 26, Public Acts of 1882," being consecutive sections 3392 to 3415, Compiled Laws of Michigan, '97. The section referred to in the bill of complaint and alleged to be unconstitutional is section 15, of said act, which for the convenience of the court, I print in full:

Sec. 15. "When the verdict of the jury shall have been finally confirmed by the court, and the time in which to take an

appeal is expired, or, if an appeal is taken, on the filing in the court below of a certified copy of the order of the Supreme Court, affirming the judgment of confirmation, it shall be the duty of the clerk of the court to transmit to the Common Council, Board of Trustees, or Board of Supervisors, a certified copy of the verdict of the jury, and of the judgment of confirmation, and of the judgment; if any, of affirmance; and thereupon, the proper and necessary proceedings, in due course, shall be taken for the collection of the sum or sums awarded by the jury. If the Common Council, or Board of Trustees, or Board of Supervisors believe that a portion of the city, village or county in the vicinity of the proposed improvement, will be benefited by such improvement, they may, by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon, they shall, by resolution fix and determine the district or portion of the city (or) village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may be, to the advantage which such lot, parcel, or subdivision is deemed to acquire by the improvement. The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when a street is graded. The assessment roll containing said assessments, when ratified and confirmed by the Common Council, Board of Trustees or Board of Supervisors, shall be final and conclusive, and prima facie evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained

shall be and continue a lien on the premises on which the same is made, until payment thereof. Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided, shall be assessed, levied and collected upon the taxable real estate of the municipality, the same as other general taxes are assessed and collected in such city, village or county. At any sale which takes place of the assessed premises, or any portion thereof, delinquent for non-payment of the amount assessed and levied thereon, the city, (or) village or county may become a purchaser at the sale."

ARGUMENT.

It will be observed that the Plaintiff in error does not contend that the proceedings had and taken by the Common Council and the Board of Assessors of the City of Detroit were not in accordance with the law; his contention being that the law itself is invalid because no provision is made therein for notice that the proceedings of the Common Council for the determination of the limits of the local assessment districts and the amount or proportion of the award of the jury to be assessed upon such district. Because the law does not fix the basis upon which or the standard by which the Common Council are to determine what is the just proportion of the compensation awarded by the jury to be assessed upon the assessment district, and because the law does not require that the amount of the award of the jury which the Common Council may order to be assessed upon such assessment district shall not exceed the total amount of the benefits derived by the land in said district.

The law does provide that "If the Common Council or Board of trustees or Board of Supervisors believe that a portion of the city, village or county in the vicinity of the proposed improvement will be benefitted by such improvement they may, by

an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited, and thereupon, they shall by resolution fix and determine the district or portion of the city, * * * * benefited and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein."

The total amount of damages for the taking of the property was $73,732.68.

The bill alleges that the Committee on Street Openings reported, recommending that $49,155.12 of said award be assessed on a local assessment district, and the balance thereof be paid by the City of Detroit, and that accordingly, a resolution was then introduced in and adopted by the said Common Council fixing and determining the property to be included in said district, * * * * and determined that the sum of $49,155.12 is a just proportion of the compensation awarded by the jury for the property taken for said improvement, which should be paid by the owners of the property included in said assessment district, and resolved that that amount be assessed and levied upon the several parcels of said real estate by the Board of Assessors.

See Section 2, Bill, p. 1.

Section 37, of title 11, of the charter of the City of Detroit, provides that "when the assessment roll is completed, said board (the Board of Assessors), shall give notice by at least five publications in the city paper that such roll is completed and will remain in their office for 12 days from the first publication of said notice." The Plaintiff in error concedes that he has an opportunity of appearing before the Assessors, but only upon the question of apportionment; and that he may show that his lot is assessed to an undue proportion, as compared with others, and nothing else."

The above I quote from the brief of the Plaintiff in error in the Supreme Court of Michigan, and in the opinion of the court, on page 8, it is said: "The notice required by section 37, chapter II, of the city charter, was duly given," so that this case resolves itself into the question whether the property owner is entitled to notice of the fixing of the assessment district and of the amount to be apportioned upon such district and what portion of the award shall be apportioned to such district and what portion to the city at large.

It seems to me that these questions have been so often presented and passed upon by this Court that the rule should be well understood.

In Davidson vs. New Orleans, 96 U. S., 97, the State of Louisiana passed an act providing for the drainage of certain territory, established an assessment district and apportioned the cost of such drain upon the property within such district. This was assailed as being in violation of the constitutional provision that no state can deprive any person of life, liberty or property without due process of law.

Mr. Justice Miller, in delivering the opinion of the court, said: "Whenever by the laws of a state, or by state authority a tax assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole state or of some limited portion of the community, and those laws provide for the mode of confirming and testing the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate in the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due processof law, however obnoxious it may be to other objections. * * * * It is said that part of the property of the Complainant is not benefited by this improvement, but this is a matter of detail, with which this court cannot interfere."

In County of Mobile vs. Kimball, 102 U. S., 691, the legislature of Alabama created a Board of Commissioners for the improvement of the harbor, river and bay of Mobile, and provided that the expense thereof should be borne by the County of Mobile. It was urged against this legislation that the work was a benefit to the whole State, and objection was raised to the act for that reason.

The court said: "Assuming this to be so, it is no objection which destroys its validity. When any public work is authorized, it rests with the Legislature, unless restricted by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It might apportion the burthen ratably among all the counties or other particular subdivisions of the State, or the whole or greater share of the whole upon that county or portion of the State, specially or immediately benefited by the expenditure. It may be that the act in imposing upon the County of Mobile the entire burthen of improving the river, bay and harbor of Mobile is harsh and oppressive, and that it would be more just to the people of the county if the Legislature had apportioned the expense of the improvement, which was a benefit to the whole state, among the different counties, but this court is not the harbor in which the people of a city or county can find refuge from ill-advised, unequal and oppressive legislation. The judicial power of the federal government can only be invoked when some right under the constitution, laws or treaties of the United States is invaded. In all other cases, the only remedy of the evils of the people which rests with the people, must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation as far as practicable and be more mindful than their predecessors of the public interest."

In Hager vs. Reclamation District No. 108, 111 U. S., 701, the Legislature of California established a general system for

reclaiming swamp and over-flowed lands in the state. It provided for the formation of reclamation districts to be established by the Board of Supervisors of the county in which the lands or the greater part of them, were situated. The supervisors were then to apportion three commissioners to jointly view and assess upon each acre to be reclaimed or benefited, a tax proportionate to the whole expense and to the benefits which will result from the work.

The court, in passing upon the objections to the validity of this act, said: "The expense of such works may be charged against the parties specially benefited and be made a lien upon their property; all that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefits received. Absolute equality in imposing, however, may not be reached, only an approximation to it may be attainable; if no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is no valid objection to the mode pursued that to some extent inequalities may arise. But this is a matter purely of legislative discretion. Whenever a local improvement is authorized, it is for the Legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation or by laying the burthen upon the district specially benefited by the expenditure."

In this case it was contended (as here), that inasmuch as no notice was provided for or given, that the act was void, and that the taking of property thereunder did not constitute due process of law. Upon this proposition, the court said: "Undoubtedly when life and liberty are involved due process requires that there may be a course of judicial proceedings which imply that the party to be affected shall have notice and an opportunity to be heard, so also, where title or possession of property is involved. But where the taking of property is in the enforce-

ment of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which the amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in Davidson vs. New Orleans: 'In judging due process of law, respect must be had to the cause and the object of the taking, whether under the taxing power, the power of eminent domain, the power of assessment for local improvement, or some of these, and if found to be suitable or admissable in a special case, it will be adjudged to be due process of law, but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law.' "

In Spencer vs. Merchant, 125 U. S., 345 (31763), an assessment for the expense of regulating, grading and preparing a street for travel was laid upon the lands lying within 300 feet of each side, which, in the judgment of the commissioners, would be benefited by the improvement. The original assessment was set aside because the statute provided no means by which the owners might have notice or an opportunity to be heard in regard to the assessment for grading and preparing the street for travel. Subsequently, the Legislature directed a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expense of making that assessment and interest since, to be levied and equitably apportioned by the supervisors upon and among those lots, after public notice to all parties in interest to appear and be heard upon the question. The said portion of that sum was levied and assessed accordingly upon these lots, one of which was owned by the Plaintiff in this action.

"The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed and upon which it is to be apportioned."

Mr. Justice Gray, in the opinion, said that, "Each of these things was within the power of the Legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. Citing within approval, Litchfield vs. Vernon, 44 N. Y., 123; People vs. Brooklyn, 4 N. Y., 427; People vs. Flagg, 46 N. Y., 405; Horn vs. New Lots, 83 N. Y., 100; Cooley on Taxation, 450. The Legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself, and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881 the legislature imposes the unpaid portion of the expense and cost, with interest thereon upon that portion of the property benefited which has thus far borne none of the burden. In doing so, it necessarily determines two things, namely, *the amount to be realized, and the property specially benefited by the expenditure of that amount.* The lands might have been benefited, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit, and the property to which it extends is, of necessity, a question of fact, and when the Legislature determines it in a case within its general power, its decision must, of course, be final. We can see in the determination reached, possible sources of error, and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881, was imposed without reference to special benefits.

The Legislature properly determined that the lands described in the act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense, and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot, for that reason, question an enactment within the general legislative power. That power of taxation is unlimited, except that it must be exercised for public purposes. Citing, Weisner vs. Douglas, 64 N. Y., 91. Certainly if the acts of '69 and '70 had never been passed, but the improvement of Atlantic avenue had been ordered, the Legislature might have imposed one part or proportion of the cost upon one designated district and the balance upon another. Practically, just that was done in this case. * * * * The Legislature, in the exercise of its power, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading and repairing of a street, to be assessed upon the owners of lands benefited thereby, and the determination of the territorial district which should be taxed for local improvement is within the province of legislative discretion. * * * * In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the Legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement and order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which should receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both these facts to the judgment of commissioners."

In this case, it was complained that the act did not give the land owners an opportunity to be heard as to the original apportionment, although it did give them opportunity to raise all pertinent and available questions, and dispute their liability as to its amount and extent. The court, in speaking of this objection, said: "That objection becomes a criticism upon the action of the Legislature, and the process by which it determined the amount to be raised, and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The Legislature determines the expenditures and the amounts to be raised for their payment, the whole discussion and all questions of prudence, propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case, it kept within its power, when it fixed, first the amount to be raised to discharge the improvement debt incurred by its discretion; second, when it designated the lots and property which, in its judgment, by reason of special benefits, should bear the burden."

Again, "When the determination of lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands *are benefited and how much, but the Legislature has the power to determine, by the statute imposing the tax, what lands which might be benefited by the improvement are, in fact, benefited, and if it does so, its determination is conclusive upon the owners, and the courts and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited.*"

Walston vs. Nevin, 128 U. S., 578 (544), was error to the Court of Appeals of Kentucky to review a judgment directing the enforcement of a lien for an assessment for a local improve-

ment in the city of Louisville. The act under which the proceeding was taken provided that, "When the improvement is the original construction of any street, road, lane or alley or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the Central Council, according to the number of square feet owned by them, respectively, except that corner lots * * * * shall pay 25 per cent more than others for such improvement. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square."

"Sec. 4. When an improvement in public ways shall have been made, * * * * and the contract therefore completed, the city engineer shall, by one insertion in one of the daily newspapers published in Louisville, give notice of the time and place fixed for the inspection and reception of the work by the city engineer or either of his assistants or deputies, and such owners or their agents or representatives may appear and be heard before such engineer or his assistant or deputy, as to *whether such improvement shall have been made in accordance with the ordinance authorizing the same and the contract therefore.*"

It will be observed that no provision was made for a hearing upon the question of the necessity of the improvement, the taxing district or the extent of the tax to be raised and levied upon the different parcels.

In this case, the court follows Davidson vs. New Orleans, 96 U. S., 104, and in commenting thereon, Mr. Justice Fuller says: "And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the lands assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards benefits conferred, nor that

personal judgment was rendered to the amount assessed, are matters in which state authorities are controlled by the Federal Constitution. Here the determination of the taxing dstrict and the manner of the apportionment are all within legislative power. Citing, Spencer vs. Merchant, 125 U. St., 345; Stanley vs. Alban, 121 U. S., 550; Mobile vs. Kimball, 102 U. S., 691; Hager vs, Reclamation Dis., 111, U. S., 701; United States vs. Memphis, 97 U. S., 284; Laramee County vs. Albany County, 92 U. S., 397. Whenever the law operates alike on all persons and property similarly situated, equal protection cannot be denied. Wertz vs. Hoagland, 114 U. S., 606; Richmond F. & P. R. R. Co vs. Richmond, 96 U. S., 529. The remedy for abuse is in state courts, for in the language of Mr. Justice Field, in Mobile vs. Kimball: "This court is not the harbor in which the people of a state can find refuge from ill advised, unequal and oppressive state legislation."

In Williams vs. Eggleston, 170 U. S., 305, Mr. Justice Brewer, speaking for the court, said: "Neither can it be doubted that if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such districts, and what property shall be considered as benefited by a proposed improvement. And in so doing, it is not compelled to give notice to the parties resident within the territory, or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is, in fact benefited."

In this case a portion of the cost of the purchase of a toll bridge over the Connecticut River, at the city of Hartford, was apportioned among five towns, designated by the legislature.

Parsons vs. District of Columbia, 170 U. S., 45, was a proceeding to test the legality of a special assessment made against the Plaintiff's land for a water main tax or assessment, for lay-

ing a water main in the street on which petitioner's land abuts. The act of the Legislative Assembly of the District of Columbia, June 23, 1873, provided, that, "Hereafter in order to defray the expense of laying water mains and the erection of fire plugs there be and is hereby levied a special tax of 1¼ cents per square foot on every lot or part of lot which abuts in or touches on any avenue, street or alley in which a main water pipe may hereafter be laid and fire plug erected." By act of Congress, August 11, 1894, it was provided that hereafter all assessments levied for laying water mains in the District of Columbia shall be at the rate of $1.25 per lineal front foot, against all lots or land abutting upon a street, road or alley in which a water main shall be laid. 28 St. at L., 275.

Mr. Justice Shiras delivered the opinion of the court, and held: "By this legislation a comprehensive system regulating the supply of water and the erection and maintenance of reservoirs and of water mains was established, and of this legislation every property owner in the district must be presumed to have notice. And accordingly, when by the act of August 11, 1894, Congress enacted that hereafter assessments levied for laying water mains in the District of Columbia should be at the rate of $1.25 per linear foot against all lots or land abutting upon the street, road or alley, in which a water main was laid, such act must be deemed conclusive alike of the question of the necessity of the work and *of the benefits as against abutting property.*"

To open such questions for review on the petition of every or any property holder would create endless confusion. Where the Legislature has submitted these questions for inquiry to a commisssion or official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing or to notice or an opportunity to be heard."

The recent case of Wight vs. Davidson, decided April 29, 1901, Advance Sheets No. 14, June 1, 1901, was a street opening case in the District of Columbia. The act of Congress provided that of the amount found due and awarded as damages for and in respect of the land condemned, not less than one half thereof shall be assessed by the jury in such proceedings against the pieces and parcels of ground situated and lying on each side of the extension of said street, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as therein provided. The principal objections urged against the validity of the act, as stated by Mr. Justice Shiras, were first, because, as is alleged, it arbitrarily fixes the amounts of benefit to be assessed irrespective of the amount of benefits actually received or conferred upon the land assessed by the opening of the streets, and second, because it contains no provision for notifying the owners of the property to be assessed in advance of such assessment, or at any time pending the consideration of the cause by the jury.

The court here reviews the authorities hereinbefore cited, and held that the proceedings in that case constitute due process of law.

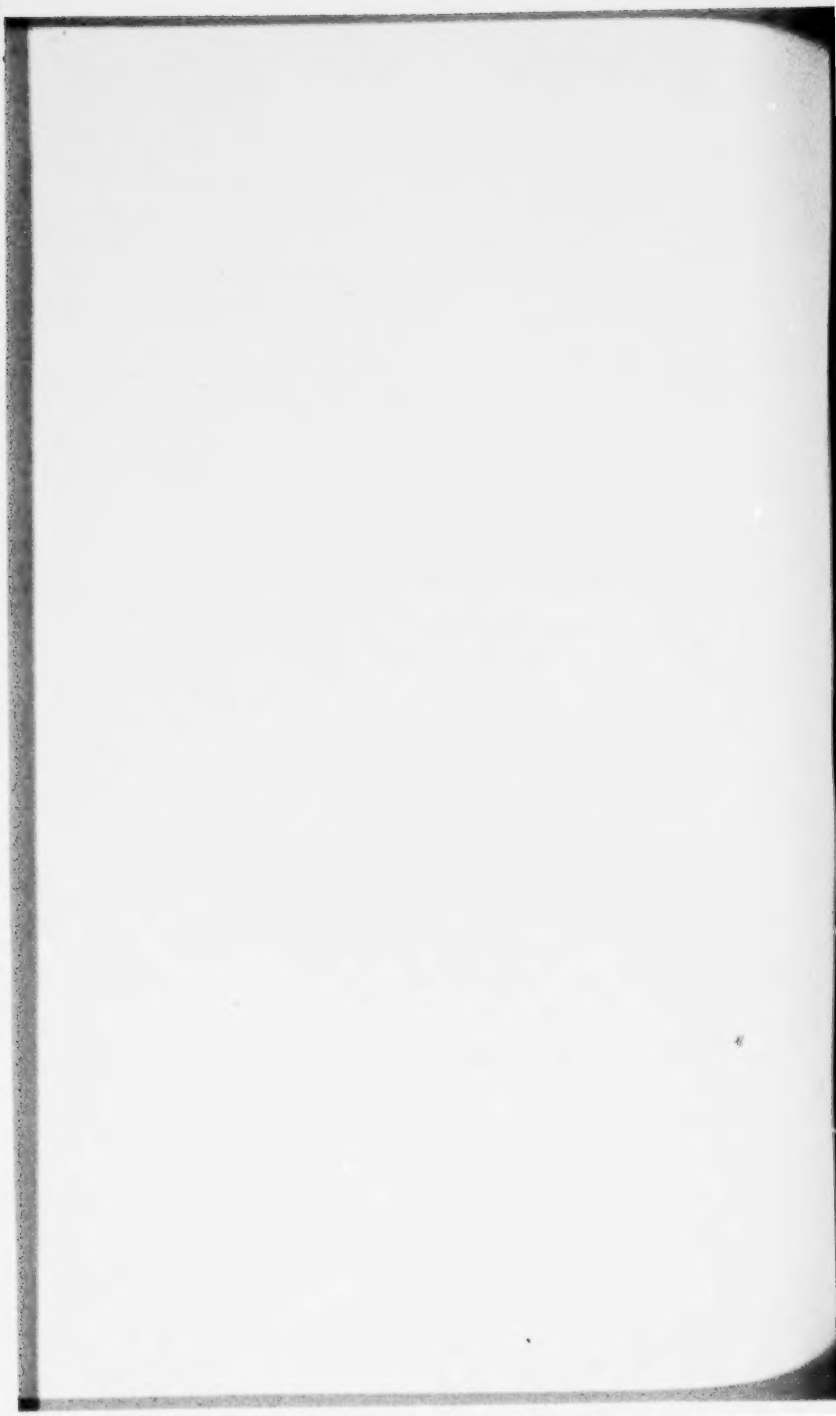
We have here, then a case arising under the laws of the State of Michigan, that has been declared constitutional by the highest court in that state,—a case where the Plaintiff in error had notice of the apportionment of benefits among the several lots and parcels of land embraced within the assessment district, and no complaint is made by him of any lack of notice in that respect or of other proceedings as not being in conformity with the provisions of law, and brings us within the rule laid down in the case of Cass Farm Co. Limited vs. the City of Detroit, decided by this Court, April 29, 1901, that Federal Courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state, applicable to all persons in like

circumstances and conditions, and is like the frontage assessment cases, where it was said in French vs. Barber Asphalt Co., that, "What was complained of was an orderly procedure under a scheme of local improvement prescribed by the Legislature and approved by the courts of the state, as consistent with constitutional principles."

I respectfully submit that the judgment of the Supreme Court of the State of Michigan should be affirmed.

TIMOTHY E. TARSNEY,

Corporation Counsel of the City of Detroit, Michigan,
Attorney for Defendants.



No. 83.

FILED
DEC 5 1901
JAMES H. McKENNEY,
Clerk

Brief of Joslyn for D. E.

SUPREME COURT

Filed Dec. 5, 1901.

OF THE UNITED STATES.

83.

EDWARD W. VOIGT,
Plaintiff in Error.

vs.

THE CITY OF DETROIT, et al.,
Defendant in Error.

No. 17,800

ERROR TO THE SUPREME COURT OF MICHIGAN.

BRIEF OF C. D. JOSLYN FOR DEFENDANT IN ERROR.

DETROIT:
THE THOS. SMITH PRESS, 42-44 LARNED ST., W
1901.

SUPREME COURT

OF THE UNITED STATES.

EDWARD W. VOIGT,
Plaintiff in Error,
vs.
THE CITY OF DETROIT and
THOMAS M. LUCKING, Receiver, Etc.,
Defendant in Error.

No. 17,800.

Error to Supreme Court of the State of Michigan.

BRIEF OF C. D. JOSLYN, OF COUNSEL FOR DEFENDANT IN ERROR.

STATEMENT.

In the year 1898, the City of Detroit took proceedings to open and extend Second avenue from the Boulevard north to the city limits, where the same was not already opened. In that proceeding damages for property taken were awarded to the amount of seventy-three thousand seven hundred thirty-two and sixty-eight one-hundredths dollars ($73,732.68). No question is or has ever been made as to the validity of this award.

In January, 1899, the Common Council, as it was bound in law to do, proceeded to make an assessment to pay said award. It was obliged to and did proceed under the following State statute:

> "If the common council or board of trustees or board of supervisors believe that a portion of the city, village or county, in the vicinity of the proposed improvement will be benefited by such improvement, they may, by an entry in their minutes, determine that the whole or any just portion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon, they shall, by resolution, fix and determine the district or portion of the city or village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement."
>
> Compiled Laws Michigan, Sec. 3406.

In pursuance of this statute the common council of Detroit adopted a resolution determining the portion of the city which was benefited by the opening of Second avenue, which portion included the land of the plaintiff in error. The resolution recited that "it is hereby determined that the sum of forty-nine thousand one hundred fifty-five and twelve one-hundredths dollars ($49,155.12) *is a just proportion* of the compensation awarded by the jury for the property taken for said improvement." This amount was required to be paid by the owners of the property within the assessment district fixed in said resolution according to the benefits accruing to the property of each.

After the adoption of this resolution it became the duty of the board of assessors under the law to make the assessment roll, which it did. It assessed upon the owners or occupants of each lot, parcel or subdivision of land in the assessment district said amount of forty-nine one hundred fifty-five and twelve amount of forty-nine thousand one hundred fifty-five and twelve one-hundredths dollars ($49,155.12) in proportion "to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement."

The charter of the city requires that when an assessment roll is completed the board of assessors "shall give notice by at least five publications in the city paper that such roll is completed and will remain in their office twelve days from the first publication of said notice for the inspection of all concerned. At the expiration of said twelve days, said board shall, after any needful correction of such roll, sign the same and report it to the Common Council. Said Council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections. And when the same shall be corrected to the satisfaction of the Common Council, it shall by resolution confirm the same."

Marginal Sec. 219, Charter and Laws City of Detroit.

It is conceded and this suit is founded on the assumption that the various officers of the city have in all these proceedings followed the statutes. In the absence of any complaint or allegation to the contrary, we may fairly assume that the assessment was actually made according to benefits.

PREFATORY.

It will be perceived that the case we have here is not one of actual wrong or injury.

There is no allegation that the plaintiff in error is wrongfully assessed and, therefore, it is fair to assume that he has not been. Yet he insists on having this Court relieve him of a burden which, under the facts as presented by the pleadings, is fairly and justly his to bear.

Although we may properly assume that the assessment of his property is in exact accordance with the benefits which it received from the public improvement ,which is the foundation of the tax, still this Court is asked to set it aside as a taking of property without due process of law.

It may be fairly asserted that there has *actually* been due process of law, yet this Court is asked to take up a purely academic question and say that *theoretically* there has not been due process of law.

Does such a case come within the intent and purpose of the Fourteenth Amendment to the Constitution of the United States?

Is such a question as the one proposed a federal question?

ARGUMENT.

The particular method of levying assessments to defray the cost of taking private property for public use, which is complained of in this case, has been a part of the taxing system of Michigan for eighteen years. The power to levy such assessments has been exercised in one way or another ever since Michigan became a State. Streets and highways have been opened, and assessments to defray the cost thereof have been levied on the property benefited.

For some reason or other the Legislature from the beginning has made a distinction, so far as cities and villages are concerned, in the manner of levying assessments for benefits accruing from improving a street or highway already opened and benefits accruing from opening a new street or highway. In the former case the Legislature itself has always fixed the taxing district and the amount to be spread thereon, while in the latter case it has always delegated that work to some local body or tribunal.

Various methods of determining or arriving at the benefits in street openings have been tried. The experiment of having them determined by the same jury that determined the necessity for the improvement and the amount of compensation for property taken, was tried and found to be unsatisfactory. Eighteen years ago that method was abandoned and the local legislature of the city, village or county was substituted for the jury as the tribunal to determine the benefits. This method seems on the whole to have been fairly satisfactory because the statute has remained ever since with very slight amendments. Other methods had been tried, but it is not necessary to repeat the details of them. Some effort, too, has been made to provide special acts for the larger cities, but, generally speaking, they have either been declared void by our courts or have been abandoned as unsatisfactory.

We make this brief statement just to show that the statute complained of is no new or sporadic attempt on the part of the State to put upon its statute books some untried method of levying special assessments, but that it is firmly imbedded in and a part of the taxing system of the State. Moreover, it is not now receiving the attention of the courts of the State for the first time. The validity of proceedings under it, including that of the assessments, has been questioned many times but has been affirmed and reaffirmed by the Supreme Court of the State

of Michigan. The precise question raised in this case has, we think, been several times considered by said Court.

Beecher vs. Detroit, 92 M., 268.
Smith vs. Detroit, 120 M., 553.
Voigt vs. Detroit, 123 M., 547.

* * * * * * *

It is claimed by the plaintiff in error that the statute which he attacks requires three things to be done which, if done without notice to the taxpayer whose property is to be affected, results in taking his property without due process of law.

These three things are:

First. The Common Council must determine or fix generally the local taxing district.

Second. It must determine the gross amount which shall be spread upon such district.

Third. An assessment roll must be made which shall properly apportion the amount determined upon among the different parcels of land in the taxing district.

(We think the statement of the powers and duties of the assessing board is not sufficiently broad, as we hereinafter seek to show.)

It is further claimed and it may be admitted that fixing the taxing district involves a determination in a general way of what property is specially benefited by the improvement and correlatively what is not.

The determination of the amount to be spread upon the district, it may be admitted, necessarily determines the question of the amount of the benefits to the district, because there is no authority in a case like this to spread as a tax anything except the amount of benefits, which the property taxed has derived from the improvement.

It is also claimed that before these two questions can be determined, the taxpayer who is ultimately to be affected has a constitutional right to be notified of these proceedings and to be heard upon both of these questions. It is admitted by counsel for the plaintiff in error that the statute provides for a notice and a hearing of some kind, but he limits its meaning or scope to a notice and a hearing upon the narrow question of apportioning the whole tax upon the several parcel sof land in the taxing district; in other words, he limits it to a simple mathematical or arithmetical proposition.

The position of the plaintiff in error, re-stated, is this:

First. The statute requires the common council to determine the local taxing district which is benefited by the improvement.

Second. It must determine the whole or gross amount of benefits to be spread thereon.

Third. This amount must be apportioned among the several parcels of land benefited.

His proposition is that the taxpayer has the right to a notice of hearing upon all three of these proceedings.

This we deny.

I.

The question of fixing a taxing district and directing the amount of taxes to be spread thereon is a public question, in the consideration of which the individual taxpayer has no constitutional or inherent right to take part.

There is nothing so peculiar in a local or special assessment as to make it any different in *character* from any other assessment. Whatever else may be said, it is certainly an exercise of the power of taxation. Whether a tax shall be laid and what

property shall bear the burden of it are questions of public policy. Equally so is the question of how much shall be raised by taxation. Whether the amount raised is to defray the expense of maintaining public schools and building school houses or to defray the expense of creating a public highway, the principle by which the government is enabled to force the citizen to pay his share of the expense in either case is the same. There is of course a well recognized difference in some of the details of the proceedings, but this does not affect their character. A local assessment, like any other tax, is levied under the authority of the State and is "an enforced contribution to the public welfare." Like any other tax, it must be levied for a public purpose. These are the essentials of a tax and they are the basic principles upon which rests the power of taxation, and they limit it as well.

Being levied for a public purpose, it follows that the question, whether or not a tax should be levied, is a public one. What is to be the amount of the tax, is equally a public question, in the discussion and determination of which the individual taxpayer and citizen is wholly represented by the officers selected to examine and determine such questions. Although the individual taxpayer may and will be ultimately affected by the determination of these public questions, still it is the recognized doctrine of all our courts that having acted through or by his chosen representative, he is not entitled to act and be heard personally on such matters, but is bound by the acts of his representative. If that agent does not act wisely, the only remedy in many cases is to select other agents.

This Court, in the case of *Mobile Co. vs. Kimball*, 102 U. S., 691, has expressed itself better than we are able to do:

> "This Court is not the harbor in which the people of a city or county can find refuge from ill-advised, unequal and oppressive State legislation. The judicial power of the Federal Government can only be invoked when some right under the Constitution is invaded. In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests."

In the case of taxation the amount is to be determined by the necessities of the government, and is usually covered by the various appropriations which are made for such necessities.

No one has ever supposed that in the discussion of the appropriations by a legislative body, the individual taxpayer, not a member, has a right to be heard, although he will be vitally interested sometimes, if not always, in keeping down the amount of appropriations and consequent taxation. He is equally interested to see that the assessing officers include for taxation all property subject thereto, but it does not follow that he has a right to be heard on the question before the assessing officers. The reason is always because it is a public question to be settled and determined by the representatives of the people. The fact that the individual is to be ultimately affected does not change the character or nature of the question. We do not care to pursue this further. The proposition here contended for is fully demonstrated in the able brief of Mr. Tarsney and the cases therein cited. We are not aware that there is any decision of this Court holding a contrary doctrine.

But counsel seems to have taken the language used in *Fallbrook Irrigation District vs. Bradley*, 164 U. S., 112, and which has since been quoted with approval in *French vs. Barber Asphalt Company*, 181 U. S., 324, as a departure from a long line of decisions, but we do not so understand it.

This Court has always recognized that a hearing of some kind must be had before the State can constitutionally take a person's property for taxes—or to repeat the language quoted by counsel, that * * "parties whose property is to be taken under summary tax proceedings are entitled as of right to be heard at some stage of the proceedings before the tax shall become an established charge against them or their property," but we do not understand that the language in the Fallbrook decision or of any other decision of this Court can fairly be claimed to go to the extent asserted by counsel. There is nothing in the language referred to that indicates to us that the taxpayer may be heard, except to complain of his individual assessment. It nowhere indicates that he is to take part in the discussion of the general proposition of fixing the taxing district or determining the gross amount of benefits to be spread thereon.

In the case of *Paulsen vs. Portland*, 149 U. S., p. 30, this Court said, at page 39:

> "By ordinance 5068 it ordered the construction of a sewer and directed what area should be drained into that sewer and created a taxing district out of that area. *For these, no notice or assent by the taxpayer was necessary.*" * * *

"By the same ordinance the city also provided that the cost of the sewer should be distributed upon the property within the sewer district and appointed viewers to estimate the proportionate share which each piece of property should bear."

"*Here for the first time in proceedings of this nature where an attempt is made to cast upon his particular property a certain proportion of the burden of the cost, the taxpayer has a right to be heard.*"

We do not understand that the Fallbrook case, or any other decided by this Court, modifies the foregoing in any way.

Therefore we contend that the fixing of an assessment district and the determination of the gross amount of the tax to be spread upon that district are public questions in the consideration of which the individual taxpayer has no right to take part or be heard.

The plaintiff in error has not bee deprived of any right in this respect, and we think the principle that "those who enjoy the benefits shall equally bear the burden" should be applied to him.

II.

The statute under which the assessment was made affords to the property owner an opportunity to be heard on all questions which concern him individually.

Referring again to the statute or charter provision with reference to notice by publication, we find that when the assessment roll is completed, the board of assessors are required to give notice that the roll is completed and that it will remain in their office twelve days for the inspection of all concerned. At the expiration of that time the board are required, after any needful revision and correction, to sign and return the roll to the Common Council. The Council may refer it back to the board for further revision and correction. When it is corrected to the satisfaction of the Council, the latter shall confirm it by resolution.

This statute has been held by the Supreme Court of Michigan to give the taxpayer an opportunity to be heard, and our contention is that the opportunity to be heard means to be heard on all matters which concern him or his individual property.

Beecher vs. Detroit, 92 M., 268; see pp. 273, 274.

Upon page 271 will be found a list of the objections made there to the law now under discussion, and objection five there is the one which is made in this case. It reads, "The law does not provide that those specially taxed for benefits may be heard." The decision of the Court was that they might be heard. We think we might safely stop here with the assertion that when the Court said the taxpayer might be heard, it meant that he might be heard upon the question of benefits, because that was the objection raised. The fact that the same Court had already affirmed the doctrine "that parties whose property is to be taken under summary tax proceedings are entitled of right to be heard at some stage in the proceedings before the tax shall become an established charge against them or their property," we think adds force to our conclusion.

See *Thomas vs. Gain*, 35 M., p. 164.

But the language of the charter, although of itself strong enough to warrant the decision of the Court above referred to, is not all there is to be considered in this connection. Referring back again to Section 3406 of the C. L. of Michigan, we find that the duty imposed in making the assessment roll was to assess "upon the owners or occupants of such taxable real estate in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement." So that when the taxpayer under the notice of publication should go to the office of the board of assessors to inpect the tax roll, what was he to inquire about or object to? The answer must certainly be, the work of the board of assessors, which was to assess each man's property in accordance with the benefit which it had received from the improvement. In other words, it was open to him to be heard upon the question of whether or not his individual property had been benefited.

We think it should be borne in mind that Section 3406 does not put the duty of making this assessment roll upon the board of assessors. It is a general mandate which in terms is directed to the legislative body of the city, village or county, and it is only because of the charter provision that the board of assessors in the matter of making an assessment roll is substituted for the common council. Eliminating the board of assessors for the moment, it will be seen that the taxpayer would then go to the common council for a correction of his assessment, and we think we may fairly draw the conclusion from the peculiar wording of the charter provision, that the taxpayer may follow the tax roll back into the common council, but this conclusion is not necessary to sustain our general proposition.

It is impossible to give to the language of the charter provision its due and natural weight, unless we hold that it does mean that the taxpayer may be heard upon the question of benefits to him or his property. If the construction of the assessment roll is a mere mathematical or arithmetical problem, as counsel seem to claim, then what is the sense of sending the roll back and forth between the board of assessors and the common council for revision and correction? It seems to us that the language of the statute wherein it says, "Said Council may then confirm the same or may, when it shall deem necessary, refer the same back to said board for further revision or corrections," is rendered meaningless by the construction put upon it by counsel. "And when the same shall be corrected to the *satisfaction of the Common Council*, it shall by resolution confirm the same." Is it not clear that all this has reference to something more than a mere computation previously ordered by the common council?"

Let us see what the process is from the beginning.

First. The Common Council fixes the assessment district, describing it by metes and bounds.

Second. It determines the gross amount or benefit to be spread upon this district.

Third. By virtue of the charter it then turns the whole matter over to the board of assessors and by a defined rule fixes the amount of the assessment upon each parcel.

Now, what is that defined rule? Simply this:

> "The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate in proportion, as nearly as may be, to the advantage of which such lot, parcel or subdivision is deemed to acquire by the improvement."

Reading the statute, section 3406, and the charter provision together, is it not perfectly clear that the Common Council is to mark out in a general way an assessment district and after an assessment roll is made which reaches or touches the individual properties, then the owner may raise the question of benefits to his property; in other words, the question whether he is rightfully and properly assessed.

We do not see how there is any escape from the conclusion that this is the meaning of the decision of the State Supreme Court, and if it is, it must dispose of the matter.

We concede that the taxpayer has a constitutional right to be heard at some period upon the question of whether or not he has been properly or rightfully taxed, and we submit that the plaintiff in error has been heard or might have been heard on all matters touching the taxation of his property in the case under discussion. We submit further, that having had that opportunity and now being unable to say that he has been unjustly or unfairly assessed, he has no grounds or cause for complaint in this or any other court.

C. D. JOSLYN,
Of Counsel for Defendant in Error.

Supreme Court of the United States.

No. 83.—October Term, 1901.

Edward W. Voigt Plaintiff in Error,
vs.
The City of Detroit and Thomas M. Lucking, Receiver of Taxes of said City of Detroit.

In error to the Supreme Court of the State of Michigan.

[February 24, 1902.]

This is a bill in equity brought by plaintiff in error in the circuit court for Wayne County, Michigan, to restrain the sale of his lands for an assessment levied by the city of Detroit, for city improvements, on the ground that the law under which the assessment was imposed is repugnant to the Fourteenth Amendment of the Constitution of the United States, and that the assessment, therefore, puts a cloud upon plaintiff's title. A demurrer was filed to the bill by defendants, which was sustained, and the bill dismissed. That action was affirmed by the Supreme Court of the State. (123 Mich. 547.) A writ of error was then allowed by the Chief Justice of the State, and the case brought here.

The bill alleged that plaintiff was the owner of certain lots, (describing them,) which were a part of the subdivision of the "Voigt Park Farm," a plat of which had been made and recorded by plaintiff. Upon the plat was designated a street called "Second avenue," and to extend that street proceedings were instituted, which resulted in a verdict opening the same as a public necessity. Damages were awarded for the property taken to the amount of $73,732.68.

The verdict was confirmed by the court, and the judgment of confirmation was transmitted to the common council of the city, and was referred to the committee on street openings. The committee reported, recommending that $49,155.12 of the award be assessed on a local assessment district and the balance be paid by the city. A resolution was then adopted by the common council fixing and determining the assessment district, and including therein the property of plaintiff. The resolution recited "that it is hereby determined that the sum of $49,155.12 is a just proportion of the compensation awarded by the jury for the property taken for said improvement which should be paid by the owners," of the property included in said assessment district; and it was further resolved that said amount

be assessed and levied upon the several parcels of said property by the board of assessors of the city. It was also alleged that plaintiff in error "had no notice of the intention of said common council to impose and have assessed upon a local assessment district a part of the damages awarded by the jury in said condemnation proceedings, and no notice to appear before said council or any committee thereof in relation to the matter of determining the limits of such district and the amount to be assessed thereon, and that he was given no opportunity to appear and be heard before said common council or any committee thereof with reference thereto."

An assessment roll was subsequently prepared, "being street assessment roll No. 111," and confirmed by the common council. By the assessment roll the sums assessed against the property of plaintiff aggregated the sum of $9,957. The roll was placed in the hands of the defendant, Thomas M. Lucking, receiver of taxes of the city, for collection, and plaintiff notified of the assessment against his property, and payment of the amount assessed was demanded. And it is alleged that the receiver will, unless restrained, advertise and sell plaintiff's property for the amount assessed thereon.

The condemnation proceedings were instituted and conducted under the provisions of section 3406 of the Compiled Laws of the State of Michigan, and it is alleged those provisions violate the Fourteenth Amendment of the Constitution of the United States, in that they deprive plaintiff of his property without due process of law, for the following reasons:

"I. Because said law does not provide for giving to the property owners interested any notice of the proceedings of the common council for the determination of the limits of the local assessment district, and the amount or proportion of the award of the jury to be assessed thereon, and does not provide for the giving to the property owners interested notice of any hearing by such common council as to the amount of land to be included in such assessment district and as to the amount or proportion of such award to be assessed thereon.

"II. Because said law does not fix the basis upon which or the standard by which the common council are to determine what is the just proportion of the compensation awarded by the jury to be assessed upon the assessment district.

"III. Because the said law does not require that the amount of the award of the jury which the common council may order to be assessed upon such assessment district shall not exceed the total amount of the benefits derived by the lands in said district from the improvement to pay the expense of which such award was made.

* * * * * *

"That the proceedings of said common council, hereinbefore set forth, in determining said assessment district and the amount to be assessed upon it are invalid for the reasons aforesaid, and for the further reason that it does not appear by the resolution fixing said district and determining the amount to be assessed thereon upon what basis or standard or

by what method the council determined the proportion of the award to be assessed upon said district, or that the amount to be assessed did not exceed the total amount of benefits derived by the property to be assessed from the improvement."

Mr. Justice McKenna, after stating the case, delivered the opinion of the Court.

The proceedings in the case were had under the provisions of an act of the State of Michigan entitled "An act to authorize cities and villages to take private property for the use and benefit of the public, and to repeal act No. 26, Public Acts of 1882." This act is reproduced in the Compiled Laws of Michigan of 1897 as sections 3392 to 3415.

The particular provisions attacked are contained in section 3406 (section 15 of the original act), and are as follows:

"When the verdict of the jury shall have been finally confirmed by the court, and the time in which to take an appeal is expired, or, if an appeal is taken, on the filing in the court below of a certified copy of the order of the Supreme Court affirming the judgment of confirmation, it shall be the duty of the clerk of the court to transmit to the common council, board of trustees, or board of supervisors, a certified copy of the verdict of the jury, and of the judgment of confirmation, and of the judgment, if any, of affirmance; and thereupon the proper and necessary proceedings, in due course, shall be taken for the collection of the sum or sums awarded by the jury. If the common council, or board of trustees, or board of supervisors believe that a portion of the city, village or county in the vicinity of the proposed improvement will be benefited by such improvement, they may, by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon they shall, by resolution, fix and determine the district or portion of the city (or) village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement. The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when a street is graded. The assessment roll containing said assessments, when ratified and confirmed by the common council, board of trustees, or board of supervisors, shall be final and conclusive, and *prima facie* evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained shall be and continue a lien on the premises on which the same is made until payment thereof. Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided shall be assessed, levied and collected upon the taxable real estate of the municipality, the same as other

general taxes are assessed and collected in such city, village or county. At any sale which takes place of the assessed premises, or any portion thereof, delinquent for non-payment of the amount assessed and levied thereon, the city (or) village or county may become a purchaser at the sale."

Plaintiff in error makes two objections to the law:

"First. That it does not afford to the property owner notice and opportunity of hearing upon the questions of what lands, if any, are specially benefited by the improvement, and therefore to be included in the assessment district, and what is the amount of the special benefit, and therefore the maximum amount to be paid by the district.

"Second. That it does not require the amount imposed upon the district to be limited to the amount of special benefit."

The common council proceeded as required by the ordinance. They determined that a portion of the city was benefited by the improvement, created a district of the property benefited, determined also that $49,155.12 was a just proportion of the compensation awarded by the jury to be assessed upon the property owners of the district created, and directed the board of assessors to make the assessment. The assessment roll was subsequently made out and was ratified and confirmed by the council. The assessment against the property of plaintiff in error was nearly $10,000.

Passing on the ordinance, the Supreme Court said: "No provision is made for a notice to property owners of a time and place of hearing upon either the question of fixing a taxing district or the question of the amount of the award to be spread thereon." But the court observed that such notices were not necessary to vindicate the statute from the charge of being unconstitutional, because "the statute provides for a hearing in relation to the proportion each piece of property shall bear to the whole cost of the improvement, and the proper notice of this hearing was given." And further:

"When the proceeding has reached that stage where it becomes necessary to decide what proportion of the cost of the proposed improvement shall be assessed to any given description of land, there must be an opportunity given to the owner of the land to be heard upon that question.

"There is no claim in the bill of complaint that his property is not benefited by the proposed improvement, in excess of the amount assessed, nor is there any claim that he was not allowed to be heard in relation to the amount which should be assessed against his property, thus avoiding the difficulties found in the cases cited by the counsel for complainant. We do not think it can be said that complainant's property is taken without due process of law. This statute has been construed in *Beecher* v. *Detroit*, (92 Mich. 268,) and *Smith et al.* v. *Common Council*, (6 Detroit Legal News, 281,) and the action taken by the common council thereunder upheld."

It was urged by plaintiff in error in the Supreme Court of the State, as it is now urged here, that—

"The act is bad because it does not fix any rule or standard by which the council are to determine the just proportion of the award of the jury to be assessed upon the district, nor limit the total assessment of the district to the amount of its benefits.

"The constitutional limit of the amount to be imposed upon the district is the total benefit to the district. The law might therefore permit the council, when, in their judgment, a portion of the city in the vicinity of the improvement is benefited thereby, to determine the amount of such benefit and to require a just proportion of the compensation awarded by the jury, not exceeding the total benefit, to be assessed upon such local district. This act contains no such limitation. The council are empowered, when they believe that a local district is benefited, to assess what in their judgment is a just proportion of the whole award upon the district, without requiring that proportion to be limited by the amount of benefit."

To the contention the Supreme Court of the State replied:

"We do not think this is a fair construction of the language of the statute. Before the council can create the district at all they must believe that a portion of the city in the vicinity of the proposed improvement will be benefited by such improvement, and then provide for an apportionment of the compensation awarded by the jury upon the property deemed to be benefited. 'The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement.' We think this language makes it clear that the amount of tax which may be assessed upon the district or upon any given parcel of land cannot exceed the benefit. Provision is then made for the assessment levy and collection of the tax."

The law, then, as we understand the decision of the Supreme Court of the State, provides for the formation of a district in the vicinity of the proposed improvement, the limits of the district to be determined by the benefits derived from that improvement, and further provides that the common council shall determine what proportion of the cost of the improvement ("compensation awarded by the jury") shall be assessed upon the owners of the real estate benefited. The language of the statute is: "The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement."

It would be difficult to find any provision fairer than this in purpose and which so essentially satisfies every requirement of due process of law. And such purpose cannot be defeated if a hearing to the property owner can prevent defeat. He is given a thoroughly efficient opportunity to be heard to test the legality of the charge upon him. And it is only with the charge upon him that he is concerned, and of that alone can he complain. In the legality of that charge is necessarily involved the legality of all which precedes it and of which it is the consequence. The Supreme

Court of the State decided, as we have seen, "that the amount of the taxes which may be assessed upon the district or upon any given parcel of land cannot exceed the benefits." On the hearing given, therefore, the property owner can show a violation of the rule, if a violation there be, and the showing will take his land out of the district and relieve it from the tax.

The contentions of plaintiff in error seem to be based on the assumption that a property owner must have notice of every step of the proceedings. Such assumption is untenable. *Weyerhauser* v. *Minnesota*, 176 U. S. 550, and cases cited; *King* v. *City of Portland*, *ante*, page ——.

Judgment affirmed.

Mr. Justice HARLAN did not hear the argument and took no part in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.